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BACKGROUND PAPER

OVERVIEW AND ASSESSMENT OF APPROACHES TO ACCESS ENFORCEMENT

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Overview and Assessment of Approaches to Access Enforcement

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EXECUTIVE SUMMARY

In February 2000, the Child Support Team of the Department of Justice Canada commissioned an overview and assessment of legal approaches to access enforcement. The purpose of this project was to produce a comparative review of legal approaches to the problem of enforcement of access orders, and to investigate and analyze Canadian case law and legislation.

METHOD

Information for this report was collected through a review of the legislation governing access in Canada, Canadian and international literature on access issues, and Canadian case law on access. In addition, the author contacted researchers, academics, government officials and practitioners for information and comment, visited Michigan's Friend of the Court program and conducted interviews with government officials and members of fathers' rights groups in Michigan.

FINDINGS

Nature and Scope of Access Denial and Failure to Exercise Access

Most custodial parents support continued access by the non-custodial parent. Many custodial parents deny access occasionally for reasons such as illness of the child. Denial of access is much more prevalent in conflictual access cases than in the majority of access cases, which are not conflictual. Within the court system, there are far more cases relating to failure to pay support than to access denial.

Some non-custodial parents fail to exercise access or fail to maintain a positive relationship with their children. The disengagement of non-custodial parents seems to increase in the years following separation. The reasons for disengagement are varied. Most custodial parents would like more contact between their children and the non-custodial parent.

Canadian Laws and Programs

The best interests of the child standard is widely accepted and implemented across Canada. However, some laws and judicial decisions are inconsistent with children's right to have custody and access determined according to that standard, to have their views when they are capable of providing them, heard and given due weight, to be protected from parental abuse, and to have their best interests considered in relation to enforcement of access orders. Successful enforcement of access orders requires that these rights be honoured.

Various preventive and alternative measures are available across Canada, including assessments, parental education, mediation and supervised access. However, these measures are not available in all parts of Canada and government funding for them is sporadic. No government requires these services to be provided, except Quebec, which mandates mediation services. It is widely accepted that mediation should be voluntary but some jurisdictions provide for court-ordered involuntary mediation.

Most provinces and territories do not legally define wrongful access denial, so that the circumstances in which a remedy should be available are unclear. Most jurisdictions do not explicitly provide for compensatory access, but judges order this even without explicit authority. In addition, jurisdictions do not explicitly provide for compensation for expenses the non-custodial parent incurs as a result of wrongful access denial, but judges also order this even without explicit authority. Most jurisdictions authorize judges to order that a party may apprehend a child or allow judges to direct law enforcement officers to apprehend a child who is being wrongfully withheld from an access visit. Parties, judges and law enforcement officers have concerns about such orders, and there is wide agreement that apprehension is a remedy of last resort that requires clear orders and trained personnel.

Criminal contempt is an available remedy for some cases of access denial, but there is wide agreement that it should be resorted to only when civil remedies fail and in keeping with the best interests of the child. Civil contempt proceedings are the most common remedy for access denial but are not very effective, and imposing penalties for contempt is often inconsistent with the best interests of the child. Despite the lack of explicit legislative authority, some courts have suspended child support or transferred custody as a remedy for access denial. Many courts, however, reject these approaches and point out that they are inconsistent with the rights and interests of the child.

Most Canadian jurisdictions have enacted measures aimed at preventing parental child abduction, legislation authorizing courts to order the release of information from persons or governments to help locate a child for the purpose of enforcing an access order, and legislation authorizing courts to order the return of a child who has been wrongfully removed from another province, territory or country or where the court lacks jurisdiction. Every province and territory has implemented the Hague Convention on the Civil Aspects of International Child Abduction. It is not clear in Canada whether a non-removal agreement, final order or law gives rise to rights of custody within the meaning of the Convention. Most parties to the Convention have ruled that they do, but *obiter dicta* in two Supreme Court of Canada decisions suggest otherwise. The *Criminal Code* provisions on parental child abduction have occasionally been invoked in cases of abductions by custodial parents.

Almost every Canadian jurisdiction has enacted legislation to provide for unilateral recognition and enforcement of foreign and extra-provincial access orders.

Most jurisdictions do not provide any remedies for failure to exercise access and do not define wrongful failure to exercise access. A few jurisdictions provide for compensation to the custodial parent for expenses incurred as a result of the non-custodial parent's failure to exercise access. A few provide that mediation or supervised access may be ordered. In one jurisdiction the court may order the non-custodial parent to give security for performance of the obligation or to provide his or her address and telephone number.

No jurisdiction provides for a government office with responsibility for enforcing access orders.

Foreign Legal Models

The United States pays relatively little attention to the rights and interests of the child in relation to access and access enforcement, while parental rights are protected by the Constitution. Civil

contempt proceedings against the custodial parent are the primary method of dealing with access denial. Children who refuse access have been found in contempt in a few cases.

Michigan is the only state with a state-wide agency that enforces access orders. Fathers' rights groups in Michigan have been active in lobbying for stronger enforcement and, now, a presumption of joint physical custody. Michigan's Friend of the Court program provides preventive, alternative and enforcement services in relation to custody and access, and also enforces support orders. The Friend of the Court's emphasis on prevention and non-adversarial dispute resolution, and its rigorous, integrated approach to enforcement, are features that Canadian jurisdictions may want to adopt. However, the Friend of the Court program is not adequately funded, caseload levels are high, and many complaints are filed about the office each year. American states generally do not provide remedies for failure to exercise access, but parental education programs aimed in part at encouraging continuing parental involvement are widespread.

Australia has paid significant attention to the rights and best interests of the child in recent legislative reforms. However, application of a strong presumption that contact with the non-custodial parent is in the best interests of the child has led to concerns about orders that do not protect the best interests of the child or protect children from parental abuse and conflict. Australia has created supervised contact centres in some parts of the country, and these have been helpful for some families who have had access problems. Remedies for failure to exercise access are not in place. A Bill currently before Australia's parliament is aimed at improving access enforcement through a three-stage process of preventive, remedial and punitive measures. The Bill has been criticized because it eliminates judicial discretion with regard to punitive sanctions and because of its rigidity. Australia's Attorney General is currently considering suggestions for amending the Bill.

European countries attend to the rights and interests of the child. Most presume that access is in the best interests of the child, but there are varying opinions on how strong that presumption should be. Some countries provide for apprehension of a child to enforce access, while some provide for a fine or for imprisonment of the custodial parent; many provide for variation of the access order. A couple of countries posit access as a duty of the non-custodial parent. In some countries withdrawal of access rights or parental authority may be ordered for failure to exercise access, and Belgium provides for compensation to the custodial parent in such cases. A couple of countries provide that children may apply to enforce an access order against the non-custodial parent. In England and Wales there is concern about the failure to adequately address the problem of domestic violence in the context of custody and access arrangements and debate on the best method of doing so.

CONCLUSIONS

Access enforcement is a matter of provincial and territorial legislative jurisdiction for the most part. The major questions for provinces and territories are whether or not they want to assume responsibility for enforcement of access orders, as they have for support orders, and whether or not they want to mandate that preventive and alternative services be provided. Providing enforcement, preventive and alternative services will require significant resources.

In order to improve the current system of access enforcement, the following are suggested:

1. Implementation of the UN Convention on the Rights of the Child be part of the law reform process in relation to access enforcement;

2. The custody and access statutes of each jurisdiction include a list of factors that the court should consider when determining the best interests of the child, and the principle of maximum contact be only one of the factors to consider;

3. The legislation of all jurisdictions require that all access orders and variations of access orders be based on the best interests of the child;

4. The legislation of all jurisdictions require that the views of the child be considered, when the child is capable of providing them, and given due weight when determining what access arrangements are in the best interests of the child;

5. The legislation of all jurisdictions provide that domestic violence is a factor that negatively affects the ability of the abuser to parent and that should be considered when determining custody and access;

6. The legislation of all jurisdictions provide that the best interests of the child be a primary consideration in any proceedings for enforcement of access orders, including contempt proceedings and applications for apprehension orders;

7. Provinces and territories provide a screening system for contested custody and access cases, undertake early identification of difficult cases, and provide services to address issues that are likely to give rise to ongoing access enforcement problems;

8. Specific access orders that the parents and enforcement officers can easily understand be made when ongoing access problems are likely in order to prevent disputes and facilitate enforcement actions;

9. Provinces and territories set up a system for evaluating complaints of access denial and failure to exercise access to determine the appropriate course of action;

10. Provinces and territories provide either mandatory or voluntary parental education for all custody and access disputes;

11. All provinces and territories provide courts the explicit authority to order parental education in cases of access denial or failure to exercise access;

12. Provincial and territorial legislation authorizing courts to order mediation be repealed;

13. All provinces and territories provide voluntary mediation services for custody and access disputes and set standards for those services;

14. All jurisdictions authorize courts to order that access be supervised when necessary to protect the best interests of the child;

15. All provinces and territories provide that supervised access may be ordered in cases of wrongful denial of access or failure to exercise access;

16. All provinces and territories provide supervised access facilities and the necessary services to address the problems that created the need for supervision;

17. All provinces and territories provide a statutory definition of wrongful access denial and provide remedies for access denial only when it is wrongful;

18. All jurisdictions authorize courts to order compensatory access;

19. All provinces and territories authorize courts to order compensation for expenses incurred as a result of wrongful access denial or wrongful failure to exercise access;

20. All provinces and territories provide for apprehension and delivery of a child by a law enforcement officer or other person to a person entitled to access;

21. All provinces and territories provide training for enforcement officers, and provide only trained enforcement officers to apprehend wrongfully withheld children;

22. All provinces and territories extend to inferior courts the power to impose specific penalties for non-compliance with access orders;

23. All provinces and territories provide that suspension of child support and transfer of custody may *not* be used as remedies for wrongful access denial;

24. No province or territory require that the custodial parent be ordered to provide the non-custodial parent with notice of an intended move and information on the new address when this would lead to harassment, abuse, serious harm or injury of the custodial parent or child;

25. All provinces and territories consider providing courts with authority, in the context of likely violation of a non-removal order or agreement, to order a person to: a) transfer property to a trustee to be held subject to terms and conditions, b) make any child support payments to a trustee, c) post a bond payable to the applicant, or d) surrender his/her passport, the child's passport or other travel documents;

26. All provinces and territories provide that courts may order that information needed to enforce an access order be given to the court, and that the court may then give the information to such person or persons the court considers appropriate;

27. All provinces and territories authorize courts to order the return home of a child who has been wrongfully removed to or retained in the jurisdiction, or when the court does not have jurisdiction;

28. All provinces and territories consider extending Legal Aid to qualifying parents who are attempting to enforce a right to access in cases governed by the Hague Convention on the Civil Aspects of International Child Abduction;

29. Central authorities continue to treat non-removal orders, agreements and laws as giving rise to rights of custody within the meaning of the Hague Convention on the Civil Aspects of International Child Abduction, and leave it for the courts to determine otherwise;

30. All provinces and territories provide for unilateral recognition and enforcement of foreign and extraprovincial access orders;

31. All provinces and territories consider creating a court-connected office responsible for providing intake of custody and access disputes, evaluation, parental education, mediation and supervised access, and for enforcing access orders when preventive and alternative measures fail.

1.0 INTRODUCTION

> The great danger in the Legislature endeavouring to arrange the disputes of husband and wife is lest they should lose sight of that which ought to be the primary object of all courts of justice—the conservation of the rights of the children.
>
> Lord Chancellor Cottenham, British House of Lords, July 18, 1839

1.1 Purpose

In February 2000, the Child Support Team of the Department of Justice Canada commissioned an overview and assessment of legal approaches to access enforcement. The purpose of this project was to produce a comparative review of legal approaches to the problem of enforcement of access orders, and to investigate and analyze Canadian case law and legislation.

1.2 Method

Information for this report was collected through a review of the legislation governing access in Canada (summarized in Appendix A), Canadian and international literature on access issues, and Canadian case law on access. In addition, the author contacted researchers, academics, government officials and practitioners from across Canada and from the United States, Australia and Europe (see Appendix C) for information and comment. The author also visited Michigan's Friend of the Court program, and interviewed government officials connected with that program and members of Michigan fathers' rights groups.

1.3 Overview

This report looks at the problem of enforcement of access in the context of disputes between parents. Enforcement of access in the context of child welfare or adoption cases will not be considered, and special issues raised by access orders in favour of non-parents are not addressed.

The report first reviews the literature from Canada, the United States, Australia and Europe on the nature and scope of access denial and of failure to exercise access. Strengths and weaknesses of available data on denial of access and failure to exercise access are discussed.

The report then examines legal approaches to access enforcement in Canada. The legislative frameworks and laws governing access enforcement in Canada (summarized in Appendix A) are assessed to determine whether there is compatibility, consistency or gaps among them. Legislative approaches that are more effective are identified. The range of legal measures for dealing with access denial is discussed. Canadian case law is analyzed to determine how judges are actually dealing with access denial.

The next part of the report examines legal approaches to access enforcement in the United States, Australia and, to a limited extent, Europe. The legal remedies for access denial available in these jurisdictions are outlined, and the extent to which preventive and alternative methods, such as mediation, have been adopted is addressed. Particular attention is given to Michigan's Friend of the Court program and to recent legal reforms and debates on access enforcement in Australia.

The report concludes with a discussion of how the legal framework governing access enforcement in Canada could be improved. Recommendations for reform are based on the literature review, the analysis of legal approaches to access enforcement in Canada, and the comparative examination of approaches adopted in other jurisdictions.

The overarching theme of this report is the importance of adopting a child-centred approach. This is in keeping with nationally and internationally accepted principles and with the strategy Canada is following for reform of custody and access laws:

> There is a need to explore changes that can be made to the legal rules, principles and processes to better structure the decision-making process in a child-focused way and shift the current focus of the family law system from parental rights to parental responsibility (Canada, 1999a).

More than 160 years ago, when England enacted its first statute relating to access, Lord Chancellor Cottenham, as quoted above, took a child-focussed approach and cautioned legislators to not lose sight of their primary objective—the conservation of the rights of children. Fathers and mothers continue to invoke the rights, wishes or interests of children and to make selective use of social science evidence to support their claims. Children themselves, meanwhile, often have no voice in individual custody and access disputes, and are often ignored or given little attention by lawmakers. This report attempts to sift through the competing claims and assumptions and to keep its focus on children.

2.0 NATURE AND SCOPE OF UNWARRANTED ACCESS DENIAL AND OF NON-EXERCISE OF CHILD ACCESS

2.1 Literature Review

2.1.1 Nature and Scope of Unwarranted Access Denial

In most cases, the mother is the primary caregiver of the children during marriage and the custodial parent after divorce. Fathers typically do less child rearing during marriage and are the non-custodial parents after divorce.[1] Thus, most cases of access denial involve custodial mothers denying access to non-custodial fathers. The actual amount of access denial is unknown (Pearson & Thoennes, 2000: 124), but some evidence is available.

In Michigan, the Friend of the Court program deals with and enforces orders for custody, parenting time (access) and support. Statistics from the program provide information on the amount of enforcement activity relating to parenting time denial. In 1998, the Friend of the Court handled 839,049 cases. Make-up parenting time (compensatory access) was ordered in 598 cases (0.07 percent of the total caseload). There were 5,570 cases (0.7 percent of the total caseload) in which show cause activity was requested by a non-custodial parent to enforce a parenting time order, and 188,501 cases (22.5 percent of the total caseload) in which show cause activity was requested by a custodial parent to enforce a support order (Michigan, 2000a: Appendix C). These statistics are consistent with the findings of Cohen, who notes that the "overwhelming issue bringing parents back to court was child support enforcement" rather than custody or access issues (Cohen, 1998: 48).

Hunt and her colleagues at Oxford University are currently conducting a study of the work of the court welfare officer, who prepares reports for courts in contested disputes about residence and contact (custody and access). This study provides some information on the extent to which contact denial is the problem in conflictual contact cases. The researchers note that their sample "is a very particular one," and others agree that most parents do not have a conflictual relationship (Maccoby & Mnookin, 1992: 274; Johnston & Roseby, 1997; Freeman, 1998). Hunt and her colleagues interviewed parents in 73 contested cases for which reports had been prepared six months after the end of proceedings. Of the 73 contested cases, 53 (73 percent) were contact disputes.[2] In 19 percent of the 53 cases involving contact disputes, the resident parent was denying all contact, and in 15 percent the resident parent was denying contact because the children were opposed to it. Hunt comments that in the remaining cases it is likely that at least

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[1] On the sexual division of labour for primary child care, see Statistics Canada data from 1998, showing that 24 percent of women engage in primary child care and spend on average 2.4 hours per day on that activity, while 18 percent of men spend an average of 1.8 hours per day on that activity): (available online at http://www.statcan.ca; accessed on March 13, 2000). A national survey of children aged 0-11 found that 78.7 percent lived with both biological parents, 4.3 percent lived with one biological and one stepparent, 14.6 percent lived with a female single parent, and 1.1 percent lived with a male single parent. In 76.9 percent of families with one biological parent and one stepparent, the biological parent was the mother (Canada, 1996).

[2] This percentage is consistent with the finding of most researchers that parents are more likely to have disputes relating to access than to custody (e.g. Richardson, 1988: 163).

some of the custodial parents "were really opposed to contact per se but had learned that this didn't go down well with the courts so were making it difficult in practice."[3]

Richardson's major study of divorce and family mediation, in which data was collected from 1,773 court files, 905 divorced or separated men and women, and 220 lawyers and mediators, found that in about 11 percent of the cases in which the mother had sole custody, the father did not, in fact, have access; however, in most cases this was not the result of access denial. The reasons given for the lack of access included "failure to pay maintenance (22 percent), the father has moved away (30 percent), he is not interested in maintaining contact with his children (55 percent) and the children do not want to see him (20 percent)" (Richardson, 1988: 166).

In a random sample of five representative communities in Alberta, researchers separated those who identified themselves as being involved in a child access situation from the general sample, and compared the responses of the 30 custodial and 26 access parents. Most custodial parents (74 percent) reported that their experiences with access were relaxed, informal or somewhat difficult but manageable, compared to just under half (48 percent) of access parents. Close to half (45 percent) of access parents reported that their experiences were very difficult and strained, whereas only 19 percent of custodial parents did so (Perry et al., 1992: xiii).

In the Alberta study, custodial parents were more likely than non-custodial parents to report that child support was not paid on time and in full, and they reported discussing their children's lives with the other parent more frequently than did non-custodial parents. While non-custodial parents reported missing visits because their children were too busy, the visit was inconvenient for the custodial parent or the visit was inconvenient for them, custodial parents gave a wider range of explanations for missed visits. Custodial parents said that the most frequent reason for missed visits was that it was inconvenient for the non-custodial parent, followed by that the children were sick or busy, that their children refused to go on a visit, that it was inconvenient for the custodial parent, or that the non-custodial parent had a drug or alcohol problem that interfered with visits (Perry et al., 1992: 71).

More than a third (38.5 percent) of custodial parents reported denying access at one time or another, and their reasons for denying access were that the children were busy or sick, that the other parent had a drug or alcohol problem that affected the visits, that it was inconvenient for them, or that the family was away on holiday. Some (9.1 percent) custodial parents expressed concerns about physical abuse by the non-custodial parent, and one reported concerns about sexual abuse. More than half (57.1 percent) of the non-custodial parents said they had been denied access at some time, and reported the following reasons: it was inconvenient for the custodial parent, the children were away on holiday, the children were busy or sick, and the custodial parent did not want the relationship to continue. A very large majority of the custodial parents wanted the non-custodial parent to maintain contact with the children (Perry et al., 1992).

Researchers in Australia also found that most custodial parents want the non-custodial parent to maintain access. A major three-year study is under way on the impact of the *Family Law Reform Act 1995*, which, *inter alia*, changed the custody and access laws of Australia to encourage ongoing involvement of both parents, and replaced the terms *custody* and *access* with *residence*

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[3] Personal communication from Joan Hunt, Centre for Socio-legal Studies, Oxford University, April 18, 2000.

and *contact*. The study included personal interviews with Family Court judges and judicial registrars, family law solicitors and barristers, Family Court counsellors and private and community-based counsellors and mediators. As well, the researchers assessed and compared 209 pre- and post-*Reform Act* interim and final judgments. The researchers released their interim report on this important study April 1999, and updated it seven months later in their submission to the Australian Senate Legal and Constitutional Legislation Committee (Rhoades et al., 1999).[4] The study found that most resident parents are supportive of contact between the children and the non-resident parent, that most women have not sought to deny contact to their former partners even where there is a history of domestic violence, and that women who had domestic violence concerns wanted some form of safety measure, such as supervision of the contact, rather than no contact.

Researchers in Denmark and England have also found that the large majority of custodial mothers want some contact even when there was a domestic violence issue (Hester & Radford, 1996).

In summary, most custodial parents support continued access by the non-custodial parent. Many custodial parents deny access occasionally for reasons such as illness of the child. Denial of access is much more prevalent in conflictual access cases than in the majority of access cases which are not conflictual. Within the court system, there are far more cases relating to failure to pay support than to access denial.

2.1.2 Nature and Scope of Non-exercise of Child Access

Researchers and clinicians have identified a tendency of fathers to fade out of their children's lives. This phenomenon is a societal concern because economic support from the non-custodial parent is consistently associated with more positive outcomes for children. The maintenance of a relationship with the non-custodial parent is associated with better outcomes for many, though not all, children (Lamb et al., 1997: 397-398).

In many Anglo-American jurisdictions, there is evidence that a significant percentage of non-custodial fathers physically, emotionally and financially withdraw from their children, and that this withdrawal increases over time (Lamb et al., 1997: 393; Furstenburg et al., 1983: 656; Hetherington et al., 1976: 417; Seltzer & Bianchi, 1988: 663; Seltzer, 1991: 79). A clinical psychologist in Michigan noted that the "drop out rate for 'visiting' fathers in [the divorce] process is quite high, with the degree of father involvement declining dramatically as little as two years post-divorce" (Davis, 1997: 22).

The precise scope of failure to exercise access is unknown, but some evidence is available. A Canadian study that looked at access in the context of divorce in the late 1980s found that more than 40 percent of parents granted access did not see their children at all or saw them no more than once at month. The involvement of non-custodial parents was found to be generally low, and there was a process of gradual disengagement from participation in active parenting over time (Canada, 1990b). More recently, the National Longitudinal Survey of Children and Youth found that 86 percent of children whose parents did not live together lived with their mother, 47 percent saw their father regularly (30 percent once a week, 16 percent every two weeks),

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[4] November 1, 1999 (on file with the author).

25 percent saw their father irregularly (once a month, on holidays or at random) and 15 percent never saw their father. Moreover, the regularity of visits decreased over time such that after five years 32 percent of children saw their father irregularly and 24 percent never at all. Children of never-married parents were twice as likely as children of married parents to never see their father (21 percent versus 11 percent) (Canada, 1999b: 21-26).[5]

An Alberta study found that more custodial parents (45 percent) than access parents (36.8 percent) would like there to be more access, and almost all (92 percent) of the custodial parents said they wanted the other parent to maintain contact with the children (Perry, 1992). Other studies have also found that custodial parents wish there were more access. Based on his empirical study of divorce mediation services in four Canadian cities, Richardson commented that "many custodial parents express concern about the effects on their children of fathers' absence and the most commonly voiced complaint concerning access is that such rights are not exercised, or are exercised irregularly" (Richardson, 1988: 36). As noted above, Richardson found that the non-custodial father did not see the children in about 11 percent of cases in which the mother had custody and that the reasons given included that the father had moved away (30 percent) or that he was not interested in maintaining contact (55 percent) (Richardson, 1988: 166).

Wallerstein and Blakeslee reported that after 10 years few of the children in their study of affluent, high-conflict California families continued to have a close relationship with both parents. Even though a relatively high percentage of the fathers continued to visit regularly, very few maintained an emotionally rich relationship with their children (Wallerstein & Blakeslee, 1989).

In a large 1981 study, Furstenberg et al. found that 23 percent of the fathers had had no contact with their children during the previous five years and an additional 20 percent had not seen their children during the previous year. When a relationship between the non-custodial parent and children did exist, it was primarily social and access parents rarely participated in the discipline or training of their children (Furstenberg & Nord, 1985).

Patterns of disengagement vary among groups. In a study of 731 Colorado custodial parents, almost all of whom (94 percent) were custodial mothers, failure of the non-custodial parent to exercise access was highest among those with incomes below the poverty line and among never-married parents, although never-married African-Americans maintained more contact than did never-married Anglo- or Hispanic-Americans. Among married parents, however, African-Americans maintained less contact (Pearson et al., 1992). Class was also identified as a significant factor in a British study of 91 fathers. The study found that non-manual workers had the most post-separation contact with their children and unemployed fathers the least (Newcastle Report, 1995).

Furstenberg et al.'s large study cited above found that fathers tended to disengage from their children. However, the authors did not draw the conclusion that paternal contact benefits the

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[5] See also the report of June 2, 1998 of the National Longitudinal Survey of Children and Youth (available on Statistics Canada's web page, http://www.statcan.ca/), which revealed that of the 94 percent of children of separated parents who are not in joint custody arrangements, only 58 percent saw their non-custodial parent at least once a month and that failure to provide child support was common among non-custodial parents (Gadd, 1998).

child. Children who had not seen their fathers in five years often appeared to be doing better when measured against a range of behavioural and academic measures than did children who had seen their fathers frequently or more recently. The authors concluded that "on the basis of our study, we see no strong evidence that children will benefit from the judicial or legislative interventions that have been designed to promote paternal participation, apart from providing economic support" (Furstenberg et al., 1987: 695). Similarly, Buchanan and her colleagues reported that the amount of access was not important to adolescents' post-separation adjustment, and that "even adolescents who rarely or never saw their non-residential parents were, on average, adjusting as well as adolescents who saw their non-residential parents on a regular basis" (Buchanan et al., 1996: 262). Several researchers have found that the quantity of access is less important than the quality. In a review of studies of various custody arrangements, Johnston concluded that a "more substantial amount of access/visitation, in itself, was associated with neither better nor worse outcomes in these children" (Johnston, 1995: 419). Lamb and his colleagues commented that in order to maintain positive relationships with their children, "parents need to have sufficiently extensive and regular interaction with them, but the amount of time involved is usually less important than the quality of the interaction that it fosters" (Lamb et al., 1997: 400).

Many researchers have concluded that absence of conflict and a well-functioning custodial parent are more important factors than access visits in achieving positive post-separation outcomes (Furstenberg & Cherlin, 1991: 119).[6] In high conflict cases in which access exposes the child to parental conflict, access is often not in the best interests of the child (Lamb et al., 1997: 397-398; Bala, 1999: 193).

Richards, on the other hand, noting the downward social mobility of children of divorced parents and that non-custodial fathers have the potential to contribute not just child support but other material assistance and access to a broader kinship group that is also a source of material assistance, suggests that more attention be paid to the long-term implications for children. He says, "Doing all we can to maintain children's parental relationships and kin network through divorce may be much more important than those concerned with the immediate aftermath of divorce have suggested" (Richards, 1993: 314; see also MacLean & Wadsworth, 1988; Kitson & Morgan, 1990). Lamb and his colleagues commented as follows:

> Most children in two-parent families form psychologically important and distinctive relationships with both of their parents, even though one may be a primary caretaker. Their relationships are not redundant because mothers and fathers each make unique contributions to their children's development and individuality. The majority of children experiencing parental divorce express the desire to maintain relationships with both of their parents after separation. Therefore, in addition to enhancing the psychosocial and economic well-being of residential parents and supporting their relationships with

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[6] The authors concluded that "this doesn't mean that we should abandon efforts to increase the involvement of divorced fathers in their children's lives. But for the near future, our chances of improving children's adjustment to divorce are probably better if we concentrate on supporting custodial parents and reducing conflict. More assistance to mothers and children and changes in family law carried out with those aims in mind will help the one million American children per year who must cope with their parents' divorce."

> offspring, post-divorce arrangements should also aim to promote the maintenance of relationships between non-residential parents and their children (Lamb et al., 1997: 400).

Reasons offered for fathers' physical and emotional disengagement are various.[7] Ninety percent of the 40 disengaged fathers in Kruk's study reported that discouragement or denial of access by the custodial mother was a reason for their disengagement. Additional reasons cited were that the fathers had decided to cease contact (33 percent), there were practical difficulties such as distance, finances or work schedule (28 percent), the children did not want contact (18 percent), a legal injunction prevented access (16 percent), and there was an early pattern of no contact (5 percent) (Kruk, 1993: 71).

Several studies show that a conflictual relationship between the father and mother and limited discussion regarding child rearing are associated with withdrawal by the non-custodial father (Ahrons, 1982: 55; Hetherington et al., 1976: 417; and Lund, 1987: 173). A number of studies documented negative feelings of fathers after divorce that may be linked to disengagement. Some access fathers reported feelings of loss, guilt, anxiety, depression, and loss of self-esteem (D'Andrea, 1983: 81; Grief, 1979: 311; Hetherington et al., 1976: 417; Friedman, 1980: 1177; Stewart et al., 1986: 55). Some expressed a feeling of being treated unfairly and hostility towards their ex-wives and their lawyers, and anger and frustration with the legal system (D'Andrea, 1983: 81; Grief, 1979: 311; Hetherington et al., 1976: 417; Friedman, 1980: 1177; Stewart et al., 1986: 55). Some were dissatisfied with the custodial arrangements and felt they lacked influence over their children (D'Andrea, 1983: 81; Grief, 1979: 311; Luepnitz, 1982; Steinman, 1981: 403). Lamb and his colleagues commented that decline in contact seems "at least in part, attributable to difficulties in visitation arrangements that reduce or eliminate the opportunities for non-residential parents to be involved in broad areas of their children's lives, making their relationships seem peripheral or artificial" (Lamb et al., 1997: 397).

Judge Weisman suggested that non-custodial fathers withdraw from their children because they assume caretaking responsibilities in second families. In effect, they "trade" one set of children for another, sometimes assuming responsibility for stepchildren and sometimes having more children with a new partner (Weisman, 1984: 268). Recent research partially supports Judge Weisman's analysis. Cooksey and Craig report that "when men father additional biological children, we find that the biological children they fathered at an earlier time tend to be displaced." These researchers found, in contrast, that additional stepchildren (as opposed to new biological children) do *not* displace the biological children of an earlier relationship (Cooksey & Craig, 1998: 198).

Many commentators have emphasized the importance of adopting language that will change conceptions of divorce and its effect on the parent-child relationship. Elkin has argued that there is a need to use words

> that will reinforce that parents and families are forever and that a divorce merely ends the husband and wife role, but not the parenting responsibilities. We need words that will encourage parents to carry out their responsibilities to their children and to each other.

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[7] For a helpful review of the literature and a recent study of the issue, see Cooksey and Craig, 1998.

> We need words that will reaffirm the joint ongoing effort of parents, not just a part-time effort on the part of one and a full-time effort on the part of the other (Elkin, 1975: viii).

The language of encouragement Elkin advocated is supported by those who criticize the language of custody and access because it suggests that children are the property, or prisoners, of their parents (Ryan, 1989: I-6, I-11). These people also criticize the language of custody and access because it promotes the idea of winner-take-all, fails to connote the continuing parental responsibilities of both parents and is alienating to non-custodial parents. Pearson and Thoennes found that non-custodial parents had a sense of inequality about their parenting role because of the labels assigned to them, and that, because of this sense of inequality, many custody disputes focussed on power and the right to participate in the lives of the children (Pearson & Thoennes, 1984: 497). Patrician's study of 90 non-custodial fathers found that the terms *sole legal custody* and *non-custodial parent* had negative connotations for the men and that the term *non-custodial parent* was viewed as weak, powerless, bad, useless and unimportant, while the term *custodial parent* was viewed as strong, powerful, winning, dominant, useful, important and valuable (Patrician, 1984: 41). The author concluded that the negative connotations of *non-custodial parent* might generate a feeling of unfairness, discourage parental co-operation, and increase conflicts with the custodial parent.

Several commentators, however, have suggested that changing the language of the law will not significantly change post-separation parenting patterns (Cossman & Myktiuk, 1998: 20-21). Researchers also say that a presumption of joint legal custody or continuing shared parenting will not have a significant impact: "joint legal custody is neither the solution to the problem of maintaining the involvement of divorced fathers, nor a catalyst for either increasing or softening conflict in divorcing families" (Maccoby & Mnookin, 1992: 289; see also Furstenberg & Cherlin, 1991: 116-117).

The literature often focusses on the alienation of the non-custodial father (e.g. Fay, 1989: 407), perhaps because fathers typically do not have custody. However, the possibility that fathers are more likely to experience a feeling of alienation from their children because they are generally less involved in child care than mothers should also be considered. As well, researchers have looked mainly at post-divorce withdrawal, but there is some evidence that paternal disengagement begins well before separation. A 10-year study of personality and cognitive development of children in 110 families, 41 of which experienced divorce during the study, found that the fathers who eventually divorced withdrew from their children long before the crisis period and end of the marriage. The research also found that paternal disengagement and unreliable behaviour prior to divorce, particularly with regard to sons, coincided with the mother wishing that the father would become more involved in parenting (Block et al., 1986). If disengagement does develop before separation, explanations relating to post-separation variables may be regarded as partial. Efforts to address the disengagement of fathers, however, have focussed on post-separation variables such as custody and access language. The idea that paternal disengagement begins before separation and may continue regardless of what happens has been given little attention.

There are few studies of non-custodial mothers, but those that do exist suggest that non-custodial mothers are less likely to disappear from their children's lives than are non-custodial fathers. In Grief's study, 15 percent of custodial mothers reported that access fathers never saw the children,

compared with 9 percent of custodial fathers who reported that access mothers never saw the children (Grief, 1985: 139). Maccoby and Mnookin reported that while children tended to see their non-custodial fathers less as time went on, they tended to see their non-custodial mothers more (Maccoby & Mnookin, 1992: 197). In their report on adolescents, Buchanan et al. reported that only 4.1 percent of father-resident adolescents had not seen their non-custodial mother for at least a year, while 7.5 percent of mother-resident adolescents had not seen their father (Buchanan et al., 1996: 162). In Canada, the National Longitudinal Survey of Children and Youth found that about 46 percent of children who lived with their mothers saw their fathers irregularly or not at all at the time of separation, while about 40 percent of children who lived with their fathers saw their mothers irregularly or not at all (Canada, 1999b: 23). There is also some evidence that non-custodial mothers are more likely than non-custodial fathers to maintain contact with their children even if they have defaulted on their child support payments (Pearson et al., 1992: 332). However, other researchers present a different picture. Richardson's 1988 study found that children in the custody of their mother saw their father rarely or never in 12.8 percent of cases, while children in the custody of their father (less than 10 percent of the total) saw their mother rarely or never in 26.2 percent of cases (Richardson, 1988: 167).

The reasons for non-custodial mothers becoming estranged from their children may be somewhat different from those for non-custodial fathers. For example, some research shows that custodial fathers may be more likely than custodial mothers to give negative information to the children about the other parent (DeFrain & Eirick, 1981; Fischer & Cardea, 1982: 3).

In summary, some non-custodial parents fail to exercise access or fail to maintain a positive relationship with their children. The disengagement of non-custodial parents seems to increase in the years following separation. The reasons for disengagement are varied. Most custodial parents would like more contact between their children and the non-custodial parent.

2.2 Strengths and Weakness of Available Data

The precise scope of access denial and of failure to exercise access is unknown, in part because claims about these problems are made within highly polarized and highly politicized contexts. During the hearings of the Special Joint Committee on Child Custody and Access, described as a "war zone" of gender politics (Bala, 1999; Laing, 1999), fathers' rights groups stated that access denial was a widespread problem, and women's groups stated that failure to exercise access or irregular exercise of access was a widespread problem (Laing, 1999). Fathers' rights advocates in the United States have estimated that the custodial parent denies or interferes with access in 37 percent of cases (National Council for Children's Rights Inc., 1991). It is unclear to which cases these fathers' rights advocates were referring, but if they were referring to all cases involving a non-custodial parent, the figure they cited is far higher than that found by any researcher and clearly exaggerated.

Apart from political rhetoric, interviews with individual custodial and non-custodial parents are likely to yield other results other than noted above because custodial and non-custodial parents are differently situated and have varying perspectives on the access arrangements. The non-custodial fathers Richardson interviewed complained about access denial, while the custodial mothers complained that fathers did not exercise their access rights or did so only erratically and unpredictably. Richardson commented that "it is unclear which of these issues is the larger problem" (Richardson, 1988: 163), but he concluded that when men "are not in contact with their

children, this does not seem to be a result of the former wife denying them access" (Richardson, 1988: ix). Most research indicates that failure to exercise access is a bigger problem than denial of access (Perry et al., 1992: XIII; Wallerstein & Lewis, 1998: 374-375).

In assessing the scope of access denial and failure to exercise access, it is also important to note the fluidity of access relationships. Cases may switch from one category to the other. Denial of access or discouragement by the custodial parent may lead the non-custodial parent to fail to exercise access.[8] Conversely, a parent who initially failed to exercise access or exercised access inconsistently may later pursue access and be denied.[9] It should also be noted that in some cases failure to exercise access and denial of access may seem to occur simultaneously: some non-custodial parents fail to exercise access or do so erratically while at the same time they pursue their access rights or other claims in court, apparently in an attempt to harass or control the custodial parent.[10]

Reasons offered for lack of contact between non-custodial parents and their children are various, and a distinction may be drawn between reasons offered by custodial and non-custodial parents, third parties and researchers. The differing reasons of custodial and non-custodial parents likely reflect an underestimation by many parents of their own responsibility for the problem and the greater knowledge each parent has about his or her own circumstances and motivations. Researchers too may overemphasize the responsibility of one parent, particularly if their sample group includes only custodial parents or only non-custodial parents.

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[8] *Dombroski* v. *Dombroski*, [1993] A.J. No. 243 (Q.L.) (Q.B.); *McNair* v. *Tetrault*, [1995] O.J. No. 3044 (Q.L.) (Ct. Justice (Prov. Div.)).

[9] See, for example, *A.B.* v. *N.R.*, [1998] Q.J. No. 3904 (Super. Ct. (Fam. Div.)); *Martin & Matruglio*, [1999] Fam CA 1785 (December 23, 1999) (Full Court of the Family Court of Australia); *Lund* v. *Gabe*, [1995] B.C.J. No. 1903 (S.C.): father exercised access inconsistently but did not want mother to move away.

[10] *Koch* v. *Mitchell*, [1999] B.C.J. No. 52 (B.C.C.A.); *Chan* v. *Spencer*, [1998] B.C.J. No. 1317 (B.C.S.C.); *Rheaume* v. *Leclair*, [1993] O.J. No. 2380 (Q.L.) (Ct. Justice (Prov. Div.)).

3.0 CANADIAN LAWS AND PROGRAMS

This part of the report assesses the laws, judicial decisions and programs of Canada and the provinces and territories. Canada's third territory, Nunavut, came into existence on April 1, 1999, created from the northern and eastern parts of the Northwest Territories. The laws of the Northwest Territories in existence on April 1, 1999 apply in Nunavut.[11]

In keeping with the child-focused strategy the Canadian government adopted for reform of custody and access laws, this section first reviews access laws and judicial decisions to determine whether they are based on the rights and best interests of the child. Secondly, this section looks at the extent to which preventive and alternative measures for dealing with access disputes are in place. This is followed by a review of legal remedies for access denial and an assessment of the case law to determine how judges are actually dealing with access denial. Measures to prevent and deal with abduction by a custodial parent are then considered. The laws dealing with enforcement of foreign and extra-provincial access orders are briefly discussed, followed by a review of measures to deal with non-exercise of access. Finally, the extent to which access enforcement is a government responsibility is addressed.

3.1 Rights and Best Interests of the Child

Access is a right of the child, and access enforcement laws and decisions should protect the rights and best interests of the child. The rights and interests of the custodial parent and the non-custodial parent do not have priority over the best interests of the child. To protect the rights and best interests of the child, access orders should be based on the best interests of the child, and should protect children from parental abuse or violence, the views of the child, when he or she is capable of providing them, should be considered and given due weight, and the best interests of the child should be the primary consideration in access enforcement decisions.

The rights and best interests of the child are protected by the UN Convention on the Rights of the Child, which the General Assembly of the United Nations approved on November 20, 1989. The Convention sets out internationally accepted standards; every country in the world except the United States and Somalia is now a party.[12] Canada ratified the Convention on December 13, 1991, and became bound by it on January 12, 1992, subject to two reservations and one statement of understanding that were deposited at the time of ratification.[13]

Canada's ratification of the Convention means that Canada is now under an ongoing obligation to report every five years to the UN Committee on the Rights of the Child on its compliance with

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[11] *Nunavut Act*, S.C. 1993, c. 28, ss. 3 and 29.

[12] The United States signed the Convention in February 1995 but has not yet ratified it.

[13] The first reservation relates to article 21, the provision on adoption. Canada reserves the right not to apply the provision of this article to the extent that it may be inconsistent with customary forms of care among aboriginal Canadians. The second reservation relates to article 37(c), a provision that addresses, *inter alia*, the treatment of children in detention. Canada reserves the right not to detain children separately from adults when this is not appropriate or feasible. The statement of understanding relates to article 30: "In assessing what measures are appropriate to implement the rights recognized in the Convention for aboriginal children, due regard must be paid to not denying their right, in community with other members of their group, to enjoy their own culture, to profess and practice their own religion and to use their own language."

the Convention.[14] The Convention has not yet been implemented in domestic law in Canada. Although many federal, provincial and territorial laws reflect Convention principles, some do not (see for example, Bailey, 1999; Pellatt & ACLRC, 1999; Society for Children and Youth of B.C., 1998; Fanjoy & Sullivan, 1999). The Convention imposes obligations on states to take legislative, administrative and other measures to implement the rights recognized in the Convention. Implementation of Convention principles should be part of the law reform process in relation to custody and access.

3.1.1 Best Interests of the Child Standard for Access Orders

Under the Convention, a child has the right to maintain contact with the non-custodial parent unless contact is not in the best interests of the child. Parents have a right and duty to maintain contact with their children unless contact is not in the best interests of the child. Governments have a responsibility to respect the child's right of access.

The Convention states the following:

> Article 9(1): States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.
>
> Article 9(3): States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.

Under article 9(3), the best interests principle must not only be a primary consideration in access decisions but must govern the result.

Frequent, regular and unrestricted access may be in the best interests of the child in many cases. However, a wide body of academic research in various disciplines makes it clear that a strong legal presumption in favour of access may undermine the best interests of the child. In addition, this research shows that it is important to assess the needs and family situation of each child (Cantwell et al., 1999). In some cases, the best interests of the child may be served by permitting the custodial parent to relocate with the child, even if this means a drastic reduction in access.[15] When the only choices are no contact or infrequent, erratic visits that distress the child, then no contact may be in the best interests of the child.[16] If the non-custodial parent has no existing relationship with the child, lacks parenting skills, suffers from a mental illness, abuses

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[14] An authoritative guide for assessing compliance is United Nations Children's Fund, *Implementation Handbook for the Convention on the Rights of the Child* (New York: UNICEF, 1998)

[15] *Gordon* v. *Goertz*, [1996] 2 S.C.R. 27.

[16] *Butson* v. *LaCombe* (1984), 41 R.F.L. (2d) 222 (Ont. U.F.C.); *Surette* v. *Thomas* (1996), 13 O.T.C. 219 (Gen. Div.).

substances, presents a risk of abduction, or has been violent or abusive, supervised access or no access may be in the best interests of the child.[17] If the parents have a conflictual relationship or the custodial parent has previously denied access, access visits with supervised pick-up and drop-off may be in the best interests of the child (Bala et al., 1998: 35).[18] In cases of continuing high conflict, no access may be in the best interests of the child.[19]

A necessary pre-condition for improving access enforcement is to ensure that access orders meet the best interests of the child standard. This point is worth emphasizing because access orders that do not meet this standard are more likely to give rise to enforcement problems. Researchers in Australia found that after enactment of the *Family Law Reform Act 1995*, which emphasizes the principle of continuing involvement by both parents, there were serious enforcement and other problems, with several causes:

- a considered decision on the best interests of children does not occur...;
- the issue of domestic violence is not adequately taken into account; and
- there are frequently inappropriate unsupervised contact [access] orders made (Submission of the Faculty of Law, University of Sydney, quoted in Australia, 1999: 9).

Many custodial parents will find it difficult to comply with orders that are not in the interests of their children. Judges and law enforcement officials are unlikely to enforce access orders vigorously and whole-heartedly unless they assume that the access ordered is in the best interests of the child.

Another reason to emphasize this point is that law reform initiatives to improve access enforcement are often driven by fathers' rights groups, who demand stricter access enforcement when governments actively enforce child support orders. This is the case in Canada, in particular at the Special Joint Committee on Child Custody and Access:

> A number of witnesses, including a large number of support-paying non-residential parents, objected to the fact that Canadian governments had created a state-financed support enforcement system, present in every province, in which government resources are spent on collecting child support. These witnesses felt that equal government attention and resources should be devoted to access enforcement and that there should be

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[17] *D.F.M.* v. *J.S.S.* (1995), 17 R.F.L. (4th) 283 (Alta. C.A.): supervised access in best interests of child; *Abdo* v. *Abdo* (1993), 50 R.F.L. (3d) 171 (N.S.C.A.): no access in best interests of the child; *E.H.* v. *T.G.* (1995), 18 R.F.L. (4th) 21 (N.S.C.A.): no access in best interests of child.

[18] In an article summarizing the consensus among a group of experts from developmental and clinical psychology, sociology, social welfare, and law, the authors state, "In some circumstances, the level of hostility between two parents is so high and so recalcitrant that children are harmed rather than helped by frequent contact with each of their parents" (Lamb et al., 1997: 398).

[19] *L.M.R.* v. *R.C.B.*, [1997] O.J. No. 4578 (Gen. Div.).

a no-fee enforcement agency at their disposal to deal with access disputes (Canada, 1998b).[20]

There is a risk that the fundamental principle of access being a right of the child that should be based on the best interests of the child will be lost in this context. Thus, in considering reform of access enforcement laws, the first question to answer is whether access orders being made currently are based on the best interests of the child standard.

As indicated in Appendix A, every jurisdiction except Alberta requires that access orders be based on the best interests of the child. Alberta simply requires that the best interests of the child be taken into account. Legislation in British Columbia, New Brunswick, Newfoundland, the Northwest Territories, Nunavut, Ontario, Quebec, Saskatchewan and Yukon includes a list of factors to consider when determining what access order is in the best interests of the child. The federal government (in the *Divorce Act)*, and British Columbia, Newfoundland, the Northwest Territories, Nunavut, Ontario, Saskatchewan and Yukon specifically provide that the past conduct of a parent should not be considered in access decisions unless it affects the ability to parent.

Canadian case law reflects the principle that access is a right of the child, not the parent. In *Frame* v. *Smith*, Wilson J. (dissenting but not on this point) said, "The access right has become the child's right, not the parents' right."[21] Many judges have since adopted the following principles: "access is a right of the child to be exercised when it is in the child's best interests"[22] and "access is the right of the child, and if it is not in the child's best interests, it cannot be forced upon a child."[23]

Despite the acceptance of the principle that access is a right of the child and that every Canadian statute requires that access orders be based on the best interests of the child, courts have often applied an explicit or implicit presumptive parental right to access that cannot be rebutted by evidence that access is not in the best interests of the child. In the words of one judge, "I start with the premise that a parent has the right to see his or her children and is only to be deprived of that right if he or she has abused or neglected the children."[24] Some judges have modified this approach, taking the view that the non-custodial parent should be granted access unless access would create a threat of harm to the child or would be of no benefit to the child.[25]
Klebuc J.stated that the notion that access is the right of the child must be coupled with a presumption in favour of access in order to comply with the principle of maximum contact enshrined in section 16(10) of the *Divorce Act*, saying that "there exists a rebuttable presumption

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[20] For thorough discussions of the involvement of fathers' rights groups in the Special Joint Committee on Child Custody and Access hearings and the demands they made for stricter access enforcement, see Bala, 1999 and Laing, 1999.

[21] *Frame* v. *Smith* (1987), 9 R.F.L. (3d) 225 (S.C.C.).

[22] *T.A.* v. *F.A.*, [1995] O.J. No. 2735 at para.18 (Q.L.) (Prov. Div.).

[23] *Newhook* v. *McEachern*, [1997] N.S.J. No. 279 at para. 20 (Q.L.) (N.S.F.C.).

[24] *Tremblay* v. *Tremblay* (1987), 10 R.F.L. (3d) 166 (Alta. Q.B.) at 169.

[25] Finlayson J.A., dissenting, took this view and reviewed the relevant case law in *M.(B.P.)* v. *M. (B.L.D.E.)* (1992), 42 R.F.L. (3d) 349 (Ont. C.A.).

favouring the granting of access unless there is solid evidence confirming a real risk of danger or harm to the child, or no possible long-term benefit to the child."[26]

In 1992, the Ontario Court of Appeal equally addressed the issue of whether to apply the best interests of the child test or a presumptive right to access absent proof of risk of harm to access orders. The Court upheld an order, made under the *Children's Law Reform Act*, terminating the father's access because there were unproven allegations of sexual abuse on his part, continuing tension relating to access, and insensitivity on the part of the father to the child's emotional needs.[27] The father claimed that he had a right to access unless harm to the child was proven. The Court disagreed, stating that "it is not a question of what standard should be used to deprive a parent of access, it is a question of what standard should be used in deciding what form of access, if any, should be ordered. The answer is clear from the statutes: the standard is the child's best interests."[28]

The Supreme Court of Canada has rejected, in contrast with the decisions of some lower courts, the application of strong presumptions and has stated that access orders under the *Divorce Act* should be based on the best interests of the child. In *Young* v. *Young*, McLachlin J. made three points about the *Divorce Act* provisions:

> First, the "best interests of the child" test is the only test. The express wording of s. 16(8) of the *Divorce Act* requires the court to look only at the best interests of the child in making orders of custody and access. This means that parental preferences and "rights" play no role.
>
> Second, the test is broad. Parliament has recognized that the variety of circumstances which may arise in disputes over custody and access is so diverse that predetermined rules, designed to resolve certain types of disputes in advance, may not be useful. Rather, it has been left to the judge to decide what is in the "best interests of the child," by reference to the "condition, means, needs and other circumstances" of the child....
>
> Third, s. 16(10) provides that in making an order, the court shall give effect "to the principle that a child of the marriage should have as much contact with each spouse as is consistent with the best interests of the child." This is significant. It stands as the only specific factor that Parliament has seen fit to single out as being something that the judge must consider. By mentioning this factor, Parliament has expressed its opinion that contact with each parent is valuable, and that the judge should ensure that this contact is maximized. The modifying phrase "as is consistent with the best interests of the child" means that the goal of maximum contact of each parent with the child is not absolute. To the extent that contact conflicts with the best interests of the child, it may be restricted. But only to that extent.[29]

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[26] *Sekhri* v. *Mahli* (1993), 112 Sask. R. 253 at para 29 (Q.B.).

[27] *M. (B.P.)* v. *M. (B.L.D.E.)* (1992), 42 R.F.L. (3d) 349 (Ont. C.A.), leave to appeal to S.C.C. refused, (1993) 3 S.C.R. vii.

[28] *M.(B.P.)* v. *M.(B.L.D.E.)* (1992), 42 R.F.L. (3d) 349 at 360 (Ont. C.A.), leave to appeal to S.C.C. refused (1993), 48 R.F.L. (3d) (note) (S.C.C.).

[29] *Young* v. *Young* (1993), 49 R.F.L. (3d) 117 at 149-150.

In *Gordon* v. *Goertz*, McLachlin J., for the majority, said the following of section 16(10) of the *Divorce Act*:

> The "maximum contact" principle, as it has been called, is mandatory, but not absolute. The Act only obliges the judge to respect it to the extent that such contact is consistent with the child's best interests; if other factors show that it would not be in the child's best interests, the court can and should restrict contact.[30]

The Supreme Court of Canada has clarified that the "maximum contact" principle does not displace the best interests of the child standard, but some lower courts have applied this principle to rule that there should be a presumptive right of parental access absent proof of harm. The Special Joint Committee on Child Custody and Access recommended that section 16 be amended to include a list of factors that the court should consider when determining the best interests of the child, and that the "maximum contact" principle be only one of the factors to consider (Canada, 1998b, Recommendation 16). This recommendation should be implemented to clarify the relevant factors that courts should consider and that the "maximum contact" principle is only one such factor. Implementation would also keep judges from making access orders that are not in the best interests of the child, which are more likely to give rise to access enforcement problems. Alberta's legislation should be amended to require that access orders be based on the best interests of the child.

3.1.2 Views of Capable Children

To ensure that the rights and best interests of the child are protected, article 12 of the UN Convention on the Rights of the Child provides that children who are capable should be given the right to express their views on matters affecting them, that children's views should be given due weight, and that children should have the opportunity to be heard in any proceeding that affects them, either directly or through a representative. Access arrangements are "matters affecting children;" therefore, access laws should require that the views of capable children be taken into account when determining the best interests of the child. There is wide recognition of the importance of hearing and giving due weight to the views of capable children in relation to custody and access arrangements (Johnston & Roseby, 1997; Canada, 1998b; Smart & Neale, 2000).

It is important to stress that the views of capable children should be considered in relation to access arrangements when reforming the legal framework for access enforcement. It is difficult to enforce an access order against the custodial parent, when the order does not take into account the views of a capable child who then refuses access (Murray, 1999). When a child refuses access because of manipulation or other reasons that require counselling or other interventions, that problem should be addressed. In other cases, the child's views on whether access should take place and the terms of access should be considered and, in the case of older and mature children, given significant weight.

In their study of 52 children of divorced parents, Smart and Neale found that most of the children did not wish to decide themselves on custody and access arrangements but to participate in a "democratic process" in which their needs and wishes are taken into account. These authors

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[30] *Gordon* v. *Goertz*, [1996] 2 S.C.R. 27 at para. 24.

found that for some children "an irrebuttable presumption in favour of contact or of shared parenting runs entirely counter to the views and feelings they would express if they were properly consulted," and noted the following:

> It is perhaps ironic that we are now increasingly interested to hear what children have to say but, if they say things we do not like, we tend to assume that they have been manipulated by a malcontent parent. It may be that we need to safeguard against the tendency of being prepared only to hear what we regard as palatable whilst remaining deaf to the less palatable (Smart & Neale, 2000: 168, 166-167).

As indicated in Appendix A, British Columbia, New Brunswick, Newfoundland, the Northwest Territories, Nunavut, Ontario, Prince Edward Island, Quebec, Saskatchewan and Yukon require that, when the child is capable of providing them, his or her views be considered and given due weight when determining what access arrangements are in the child's best interests. The *Divorce Act* and the legislation in Alberta, Manitoba and Nova Scotia should be amended to add this requirement. Despite the fact that the *Divorce Act* does not require consideration of the views of capable children, the Supreme Court of Canada has ruled that their views are a factor to be considered when determining what access arrangements are in the best interests of the child.[31] Lower courts have also stressed that the views of the child should be considered and given due weight.[32] Courts have appropriately refused to give significant weight to the views of children when it is clear that the custodial parent is encouraging them to refuse access.[33]

Although the issue of representation of children in custody and access disputes is beyond the scope of this report, it should be noted that currently there is no adequate legal framework nor financial support to provide children with legal representation in contested custody and access cases (Canada, 1998b).

3.1.3 Protection from Parental Abuse

Pursuant to article 19(1) of the UN Convention on the Rights of the Child, states have an obligation to enact laws to protect children from violence and abuse at the hands of their parents. Most difficult access and access enforcement cases are those in which there is a history of high conflict or abuse.[34] Abuse of the child or the mother is harmful to the child (e.g. Jaffe et al., 1990). There is a particular risk of violence when women leave a relationship, especially if there are children (Barnett, 1999: 105; Bala et al., 1998: 7-8). Custodial mothers who leave a violent relationship are at risk of being assaulted when dropping off or picking up children for access visits (Hester & Radford, 1996). These facts raise the questions of what, if any, access arrangements will be in the best interests of the child and whether access orders can be enforced without undermining the best interests of the child in the presence of parental violence and abuse.

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31 *Gordon* v. *Goertz*, (1996) 2 S.C.R. 27, at paras. 49-50.

32 *Williams* v. *Williams*, (1998) A.J. No. 935 (Q.B.).

33 *R.L.G.* v. *S.A.F.*, (1999) S.J. No. 507 (Q.B. (Fam. L. Div.)).

34 Sharon Deja of Michigan's Friend of the Court program commented that in her experience, 90 percent of access disputes involve high conflict cases. Steve Copps of the same office, and a former Friend of the Court referee, commented that most access enforcement disputes involve cases in which violence is a factor (interviews, Lansing, Michigan, April 13, 2000).

In cases of abuse, supervised access may be in the best interests of the child (Strauss, 1995). Strauss and Alda state that "even where a parent has been abusive, contact in a safe setting allows a child to come to terms with the abusive parent and may serve to avoid destructive repetitions later in life" (Strauss & Alda, 1994: 234-235). In some communities, however, adequate supervised access facilities are not available and, in some cases, access would not be in the best interests of the child even when supervised (Strauss & Alda, 1994; Peterson-Badali et al., 1997: 74-75). Lamb and colleagues comment as follows:

> Adults who have a history of chronic spouse abuse or battery also represent threats both to former partners and children. When such histories exist, the potential costs of terminating the children's relationships with their violent parents need to be evaluated thoroughly by trained and impartial professionals whose recommendations concerning the termination of parent-child contact should be made and implemented expeditiously (Lamb et al., 1997: 401).

Other jurisdictions have enacted legislation requiring courts to take domestic violence into account when determining custody and access applications (Bala et al., 1998: 47-55). In Canada, as indicated in Appendix A, only Newfoundland, the Northwest Territories and Nunavut expressly require that a court hearing an access application take domestic violence into account when determining what is in the best interests of the child. Ontario has enacted legislation to this effect that has never been proclaimed in force. The statutes in the other provinces and territories and the federal *Divorce Act* should be amended to explicitly provide that domestic violence and abuse is a factor that negatively affects the ability of the abuser to parent and that it should be considered when setting up custody and access arrangements (Bala et al., 1998).

In the absence of explicit legislation, many courts have ruled that domestic violence is relevant to determining which custody and access arrangements are in the best interests of the child.[35]

3.1.4 Best Interests of the Child Considered in Enforcement

The UN Convention's "umbrella" provision, article 3(1), requires that "in *all* actions concerning children" the best interests of the child be "*a* primary consideration." Access enforcement concerns children in a very direct way. Therefore, the best interests of the child must be a primary consideration for legislators, judges and others making decisions about access enforcement, but other factors may be considered and may be the determining factors in some circumstances.

The *Criminal Code* provisions on criminal contempt and parental child abduction have occasionally been invoked to enforce access orders. Although the criminal law is not aimed at protecting the best interests of the child, criminal provisions dealing with actions directly concerning children should support children's interests. At the same time, penal sanctions for conduct relating to children should be imposed only when the sanctions support, not undermine, the children's rights and interests. The extent to which criminal law, in addition to civil remedies, should be applied to enforce access rights should be reconsidered in light of children's rights and interests.

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[35] *Alexander* v. *Creary* (1995), 14 R.F.L. (4th) 311 (Ont. Prov. Ct.).

As indicated in Appendix A, only Alberta, Manitoba and Saskatchewan provide that the best interests of the child should be a consideration when making an access enforcement order. In the absence of explicit statutory provisions, courts generally take into account the best interests of the child when deciding whether to punish a custodial parent for contempt,[36] or whether to order apprehension of the child.[37] Some courts, however, have punished custodial parents for contempt or made other orders to enforce access without considering the best interests of the child.[38] In the context of contempt proceedings, the best interests of the child may not be the paramount consideration because the proceeding is also aimed at protecting the administration of justice; however, it should be a primary consideration.[39] The best interests of the child should be explicitly included as a primary consideration in provincial and territorial statutes on access enforcement.

3.2 Preventive and Alternative Measures

3.2.1 Evaluation

Courts generally attempt to respond to enforcement problems that arise after an order is made, but at that stage it may be too late to successfully deal with the problems underlying the denial of access. Access enforcement programs that identify the cases that are likely to involve ongoing enforcement problems *before* the initial access order is made and that include preventive measures to avoid problems are likely to be effective. The vast majority of custody and access cases are settled on consent by parents who are able to work out problems as they come up. These "low conflict families require less intrusive interventions" than do families with highly conflicted parents (Freeman, 1998: 110). Freeman describes four legal interventions that suit the level of conflict between the parents. Other problems may call for additional interventions (e.g. cases involving parents with no previous relationship with a child, cases involving a parent or child with a mental illness or disability, and cases with a high risk of abduction).

The Australian Law Reform Commission recommended early identification of cases likely to give rise to ongoing problems and allocation of additional resources to these cases, as follows:

- a judge who would deal with the case at all stages (to ensure consistency and to eliminate the need for new judges to learn the history of the case);
- separate legal representation for the children (to ensure that the children's rights and interests are represented);
- an assessment (to ensure that an expert opinion based on objective information is available);
- counselling for parents and children; and

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[36] *Salloum* v. *Salloum* (1994), 154 A.R. 65 at paras.16 and 19 (Q.B.).
[37] *Drake* v. *Cox* (1993), 336 A.P.R. 219 (Nfld. Prov. Ct.).
[38] *L.B.* v. *R.D.* (1998), 35 R.F.L. (4th) 241 (Ont. Prov. Div.).
[39] *Salloum* v. *Salloum* (1994), 154 A.R. 65 at paras.16 and 19 (Q.B.).

- mediation services for appropriate cases (ALRC, 1995b: chapter 3). Canada's Special Joint Committee recommended that there be early identification of high conflict families, and that such families be streamed into a specialized, expedited process and offered services designed to improve outcomes for their children (Canada, 1998b, Recommendation 32).

For cases in which ongoing access disputes are likely to arise, an access order that is specific about times and dates for access should be made. Enforcement actions are not possible unless the access order is specific (Michigan, 1998b: 6). A specific access order may prevent or alleviate disputes between parents who are not able to work out "reasonable" terms of access, and will allow immediate enforcement when the terms of the order are not followed.

Evaluation is also important in cases of access denial or failure to exercise access in order to determine the appropriate course of action. If the government assumes responsibility for enforcing access orders, evaluation and recommendations should be included as an important part of that responsibility. The Michigan Friend of Court program enforces parenting time (access orders), and when it receives a complaint about access denial conducts an evaluation to determine whether to seek sanctions for contempt or a modification of the order "designed to ensure future parenting time and prevent future problems" (Michigan, 1998b: 6).

No province or territory has made statutory provision for evaluation of all incoming cases, early identification of cases likely to give rise to ongoing problems, special services aimed at the cases identified as likely to be problematic, or evaluation of cases of failure to comply with access orders. As indicated in Appendix A, most provinces and territories have legislation or regulations dealing with court-ordered assessments in custody and access cases. There is no provision for assessment in the federal *Divorce Act*, but courts order assessments in divorce proceedings using provincial or territorial legislation. Many lawyers routinely request and many judges order assessments in contested custody and access cases, and often the assessment is used as a basis on which to settle disputes (McLeod & Mamo, 1998: 90).

There is a need for legislation and funding to support a system of early identification and for appropriate services to address issues that are likely to give rise to ongoing access enforcement problems. Specific access orders should be made for cases in which ongoing access problems are likely. As well, there is a need for legislation and funding to support evaluation of complaints about access denial and failure to exercise access to determine the appropriate course of action.

3.2.2 Parental Education

Parental education programs for all contested custody and access cases may be effective when offered as a preventive measure or as an alternative method of dealing with ongoing access problems. Parental education programs, which are aimed at improving outcomes for children and at decreasing ongoing conflict and litigation, are proliferating (Daisley, 1998: 7; Geasler & Blaisure, 1999).[40] Although such programs are still fairly new and untested (Beuhler 1992: 154; Kramer & Washo, 1993: 179; Frieman, 1994: 607; Arbuthnot & Gordon, 1996: 60; and Braver et al., 1997: 9), initial evaluations of parental education programs indicate that some models are

[40] In 1996, it was reported that there were 541 counties in the United States with parental education programs, and new programs were being created at the rate of 20 per month (Blaisure & Geasler, 1996).

successful on various measures (Gray et al., 1997: 280; Glenn, 1998). Kramer and Kowal, however, found that rates of re-litigation increased after introduction of a parental education program in Illinois (Kramer & Kowal, 1998).

Kramer et al. found that skills-based programs were more effective than were information-based programs at improving parental communication, that both kinds of programs reduced child exposure to parental conflict, that neither affected domestic violence, parent conflict or child behaviour problems (Kramer et al., 1998). The authors conclude that the "one-size-fits-all" approach should be abandoned in favour of programs tailored for specific groups of parents according to their problems and abilities (Kramer et al., 1998: 29). Most programs in Canada are generic and not aimed at high conflict situations, but Manitoba offers a two-seminar program in which families are divided for the second session into low conflict and high conflict groups. The high conflict groups are taught about "a low-to-no-contact approach to post-separation communication" (Canada, 2000). McIsaac and Finn found some positive results from a parental education program aimed at high conflict families, but cautioned that it "is not a panacea but is one piece in an array of interventions designed to protect children from the very negative consequences of unresolved conflict and hostility between parents" (McIsaac & Finn, 1999: 81). Fuhrman and colleagues, however, advise against limiting education on domestic violence to families in which it is present because of screening difficulties and the lack of specialized programs. These authors recommend that *all* parental education programs be designed so that they are appropriate for parents who have had an abusive relationship (Fuhrman et al., 1999). Most provinces and territories offer parental education programs to some extent (Canada, 2000), but, as indicated in Appendix A, there is almost no legislative provision for such programs.

Through a practice note (Court of Queen's Bench Practice Note 1, "Parenting After Separation", September 1, 1997, amended July 1999), Alberta's Superior Court has mandated that in a proceeding in which custody, access or child support is an issue, each party must attend a Parenting After Separation seminar. Parents do not have to attend the course when all the children are 16 years of age and older, or when both parties certify in writing that they have entered into a written agreement that settles all of the issues between them. Also, an exemption may be granted in situations involving domestic violence, kidnapping or abduction of a child, a unilateral change in *de facto* custody, or other extraordinary circumstances. In essence, this practice note prevents any application for child custody, access or support from being heard unless the application provides the clerk of the court with proof of course attendance. The practice note regulates practice in the Superior Court and, although it does not apply to applications for custody, access and child support made in the lower court (Provincial Court), parties are encouraged to attend the course.

Alberta has also enacted legislation that authorizes a court to order the custodial parent, the non-custodial parent or the child to attend an education program in response to access denial or failure of the non-custodial parent to return the child in accordance with the access order. Alberta has no law, nor is there one anywhere else in Canada, requiring mandatory or voluntary parental education at the outset of a contested custody or access case.

Despite the absence of legislation regarding parenting programs, judges sometimes order or strongly recommend that parties attend such programs. For example, in one case the Ontario

Court (General Division) ordered joint custody despite the objections of the mother, and ordered the father to participate in a parenting program with the mother if she asked him to.[41]

In a high conflict case, the Nova Scotia Family Court transferred custody to the father and strongly suggested that access by the mother would be eliminated unless the mother attended counselling or parental education classes to address the problems that were creating stress and high conflict during access visits.[42] In another Nova Scotia case, the Nova Scotia Court of Appeal suspended the father's supervised access because he had failed to comply with a term of the access order that he take anger management counselling and arrange a program of counselling and parenting education with the children.[43]

The British Columbia Supreme Court ordered access that would increase to include overnight visits provided the father attended a parental education program.[44] Attendance at a parental education program has also been ordered in cases of access denial. In Manitoba in *Paton* v. *Shymkiw*, Steel J. ordered the custodial mother, who was in contempt of an access order, "to attend and complete the session offered by the Family Conciliation Services entitled For the Sake of the Children within one month from the date of these reasons and to file with the court a letter confirming her attendance," expressing the hope that "the session will help her understand the influence her actions have on her son."[45]

The decisions made by, and recommendations of, judges on parental education in particular cases do not address the general need for parental education for parents in custody and access disputes. Although further evaluation and refinement of parental education programs is necessary, there is a growing consensus that such programs are effective at least to some degree. Mandatory or voluntary parental education should be available for all parents with custody and access disputes. Provincial and territorial legislation should be amended to provide courts with explicit authority to order parental education in cases of access denial or failure to exercise access.

3.2.3 Mediation

Another method of preventing or dealing with access enforcement disputes is mediation. When there has not been domestic violence and parents are able to work co-operatively, mediation may facilitate resolution of access disputes and prevent enforcement problems or be helpful when working out enforcement problems. Mediation is generally inappropriate when there has been a history of domestic violence (Bala et al., 1998: 72). Therefore, there should be adequate safeguards to prevent inappropriate use of mediation when there has been domestic violence. Mandatory mediation is not appropriate for family law cases (Cossman & Myktiuk, 1998: 67-70).

As indicated in Appendix A, the *Divorce Act* and Saskatchewan's statute require lawyers to advise their clients in divorce cases of the advisability of negotiating support, custody or access,

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41 *R.M.O.* v. *J.J.O.*, [1994] O.J. No. 2522 (Gen. Div.).
42 *W.A.H.* v. *S.M.L.*, [1997] N.S.J. No. 283 (Fam. Ct.).
43 *E.H.* v. *T.G.* (1995), 18 R.F.L. (4th) 21 (N.S.C.A.).
44 *Wall* v. *Wall*, [1999] B.C.J. No. 2640 (S.C.).
45 *Paton* v. *Shymkiw* (1996), 114 Man. R. (2d) 303 at para. 44 (Q.B. [Fam. Div.]).

and to inform mediation services that might be able to facilitate negotiation of these matters. The statutes of most provinces and territories provide for court-ordered mediation. Only Quebec requires the parties to attend an information session on mediation prior to the hearing of any contested custody application. Ontario and Yukon allow court-ordered mediation only "at the request of the parties." Only Newfoundland, the Northwest Territories and Nunavut explicitly authorize courts to order mediation in the case of wrongful access denial or wrongful failure to exercise access, although Ontario enacted legislation to this effect that has never been proclaimed in force. In Alberta, mediation can be ordered when there is a denial of access (with or without excuse) and when the access parent has failed to return the child (with or without excuse, but not for failure to exercise access). No jurisdiction has enacted statutory limits on court-ordered mediation in cases of domestic violence.

Mediation is provided in some parts of most provinces and territories, and is free or government-subsidized in some cases. Officials of some government-supported mediation services report that they screen for violence and say that mediation must be voluntary (Canada, 2000).

Legislative authority to order mediation is unnecessary when mediation is voluntary. The provincial and territorial statutes that authorize courts to order voluntary mediation are unnecessary, and those that authorize courts to order mandatory mediation are problematic. What is lacking in Canada is legislation requiring voluntary mediation services, standards for those services, and funding to support services across the country. The statute in Michigan, a jurisdiction where mediation of custody and access disputes is strictly voluntary and where mediation is provided for all who choose it, provides a model that Canada should consider. Michigan's *Friend of the Court Act* requires the following:

- all parties be given a pamphlet that includes information on the availability of, and procedures used in, mediation;
- all parties be informed of the availability of mediation for custody and parenting time (access) disputes;
- mediation be provided "to assist parties in settling voluntarily a dispute concerning child custody or parenting time," and that parties should *not* be required to meet with a mediator; and
- mediators have specific qualifications. Michigan's Act also states that communications made within mediation are privileged and inadmissible as evidence.[46] Provinces and territories should also include specific statutory requirements about screening for violence or other factors that make mediation inappropriate.

3.2.4 Supervised Access

Supervised access may address legitimate concerns on the part of the custodial parent and thereby helps avoid disputes and enforcement problems. As noted in Appendix A, only the laws in Newfoundland, the Northwest Territories, Nunavut, Ontario and Yukon explicitly provide that

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[46] *Friend of the Court Act*, MI Statutes, Ch. 552, ss. 5(1)(a) and (b) and 13.

a court making an order for access may order that the access be supervised.[47] Only laws in Manitoba, Newfoundland, the Northwest Territories, Nunavut and Saskatchewan provide that access supervision may be ordered in the case of wrongful denial of access or wrongful failure to exercise access.[48] The Special Joint Committee recommended the *Divorce Act* be amended to make explicit provision for supervised access orders (Canada, 1998b: Recommendation 35). The provinces that have not already done so should make this amendment and should also allow judges to order supervised access for wrongful denial or failure to exercise access.

Even in the absence of such authority, courts have ordered supervised access under their general statutory power to impose "terms and conditions" on custody and access orders.[49] Supervised access has been ordered when there has been domestic violence, there is a risk of abduction, there is no existing relationship between the child and the non-custodial parent, or the non-custodial parent suffers mental illness, abuses substances, or lacks parenting skills.[50] Supervised access has also been ordered to protect the child from emotional harm caused by the non-custodial parent during unsupervised access visits.[51] It "is also an important tool for the court as it can be used to monitor and report on the relationship and reactions of both parent and child."[52] Some supervised access services also serve a parental education function (Michigan, 1999; Bailey, 1999). Supervised exchange of children may be in the best interests of the child when the exchange is conflictual or when one parent uses exchange as a time to abuse the other (Bala et al., 1998: 35). Courts have also ordered supervised pick-up of children when there has been denial of access, thus providing an opportunity to document instances of wrongful denial on the part of the custodial parent (Pearson & Thoennes, 2000: 124).[53]

Supervised access is generally ordered to develop, re-establish or maintain a relationship between a child and a parent, or other relative, with the expectation that unsupervised access will at some point become possible. Some courts and commentators have said that supervised access is not appropriate as a long-term measure. Ontario Provincial Court Weisman J. wrote that supervised access is "a temporary and time-limited measure designed to resolve a parental impasse over access," not "a long-term remedy."[54] The Ontario Court of Appeal also emphasized that supervised access should not be "a permanent feature of a child's life" and

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[47] *Children's Law Act*, R.S.N. 1990, c. C-13, s. 40; *Children's Law Act*, S.N.W.T. 1997, c. 14, s. 23; *Children's Law Reform Act*, R.S.O. 1990, c. C.12, s. 34; *Children's Act*, R.S.Y. 1986, c. 22, s. 35.

[48] *Child Custody Enforcement Act*, R.S.M. 1987, c. C360, s. 14.1; *Children's Law Act*, R.S.N. 1990, c. C-13, ss. 41(2)(a) and 41(6)(a); *Children's Law Act*, S.N.W.T. 1997, c. 14, ss. 30(2)(b) and ss. 30(4)(a).

[49] *Miller* v. *Miller*, [1998] A.J. No. 1191 (Q.B.): supervised access ordered pursuant to the *Divorce Act*, R.S.C. 1985 (2nd Supp.) c. 3, s. 16.

[50] *Zahr* v. *Zahr* (1994), 24 Alta. L.R. (3d) 274 (Q.B.): supervised access ordered when non-custodial father had threatened to abduct child, had been violent to the mother in front of the child, and had not seen the child for two years; *J.V.M.* v. *M.P.S.*, [1997] B.C.J. No. 1631 (S.C.): supervised access ordered when non-custodial father was abusive towards and "obsessed" with custodial mother, had almost no relationship with his children and no parenting skills, and had problems with substance abuse.

[51] *S.E.H.* v. *S.R.M.* [2000] B.C.J. No. 786 (S.C.): supervised access order when non-custodial father repeatedly violated terms of access order, in part by complaining about the custody arrangements and criticizing the custodial mother to his pre-school-age daughter.

[52] *Inwood* v. *Sidorova*, [1991] O.J. No. 1417 (Gen. Div.).

[53] *Cromwell v. Cromwell*, [1994] O.J. No. 245 (Gen. Div.).

[54] J. Weisman, "On Access after Parental Separation" (1992), 36 R.F.L. (3d) 35 at 74.

decided to terminate access, rather than ordering supervised access when it was not foreseeable that unsupervised access would ever be possible.[55]

Supervised access should be supplemented by services that address the issues that create the need for supervision so that parties may eventually move to unsupervised access. For example, when access is supervised because of violence on the part of the non-custodial parent, it is important that the abusive parent "be taking steps, such as participation in counselling, that will reduce the risk to the child and permit unsupervised access at some future time" (Bala et al., 1998: 34). When access is supervised because the non-custodial parent lacks parenting skills, it "can only be a temporary remedy to introduce child to father and to assist the father in acquiring knowledge about the child and skills in parenting."[56] Unfortunately, many supervised access programs are not permitted or are unable to provide any services beyond passive supervision, and often nothing is done to address the issues that have led to an order of supervision (Bailey, 1999; Australia,1998b).[57] Non-custodial parents who have addressed the issues, by undergoing therapy or anger management programs, for example, may be permitted by courts to move from supervised to unsupervised access,[58] while some non-custodial parents may not be permitted even supervised access until they have undergone therapy.[59]

Access may be supervised by a supervised access facility, but many communities do not have facilities and those that exist have limited capacity (Canada, 2000). Many supervised access facilities report that they are underfunded and that their funding is insecure from year to year (Australia,1998b; Bailey, 1999). A volunteer or a relative may supervise access,[60] but in some cases such supervision does not provide adequate protection for the child.[61] When supervised access is ordered but an appropriate supervisor is unavailable, access may not take place.[62]

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[55] *M. (B.P.)* v. *M. (B.L.D.E.)* (1992), 42 R.F.L. (3d) 349 (Ont. C.A.) at para. 33. See also *Inwood* v. *Sidorova*, [1991] O.J. No. 1417 (Gen. Div.).

[56] *Inwood* v. *Sidorova*, [1991] O.J. No. 1417 (Gen. Div.).

[57] The Ontario Ministry of the Attorney General's web site on supervised access says that the province's 15 government-funded supervised access centres are not permitted to offer "services such as counseling, mediation, therapy, or parent education because: other agencies and professionals in the community offer these services; supervised access staff and volunteers may not be trained or qualified to provide these services; the neutrality of the supervised access service could be at risk if supervised access staff provided such services" (see http://www.attorneygeneral.jus.gov.on.ca/html/FJS/supaccess.htm; accessed on April 26, 2000).

[58] *G.N.T.* v. *J.S.T.*, [1998] B.C.J. No. 925 (S.C.): non-custodial father, who was convicted of assaulting custodial mother and who had been violent to children, was granted unsupervised access after completing anger management programs and undergoing therapy.

[59] *P.A.* v. *F.A.*, [1997] B.C.J. No. 1566 (S.C.): court ordered that non-custodial father, who had beaten custodial mother throughout the marriage and who had physically, verbally and sexually assaulted his children, must undergo therapy before he would be permitted to have supervised access.

[60] *F.K.H.W.B.* v. *F.S.M.W.B.*, [1995] N.S.J. 471 (Fam. Ct.); *R.* v. *R.*, [1997] B.C.J. No. 1623 (S.C.): access supervised by non-custodial father's current wife.

[61] *P.A.* v. *F.A.*, [1997] B.C.J. 1566.

[62] *S.F.R.* v. *E.C.R.*, [1997] B.C.J. No. 1830 (S.C.); *Inwood* v. *Sidorova*, [1991] O.J. No. 1417 (Gen. Div.).

Some courts order supervision by a person the parties agree to, with the court intervening only in the case of disagreement.[63]

Researchers have found that children are ambiguous about supervised access services. They are generally pleased to have the opportunity to see the non-custodial parent but uneasy about the circumstances and aware of the tension between their parents (Australia, 1998b). Supervised access, as with any other access arrangement, should be ordered only when it is in the best interests of the child and the views of the child, when he or she is capable of giving them, should be heard and given due weight.

The Special Joint Committee recommended that the federal, provincial and territorial governments work together to ensure that supervised access facilities are available in every part of Canada (Canada, 1998b: Recommendation 34). This recommendation should be implemented, and adequate long-term funding put in place to support the facilities and to provide the necessary services to address the problems that created the need for supervision.

3.3 Remedies for Access Denial

Children have a right to maintain contact with the non-custodial parent, unless access is not in their best interests. Therefore, adequate remedies for access denial are necessary to protect the rights and interests of children. The issue of access denial may arise when a parent is seeking an initial custody or access order,[64] a variation of custody or access,[65] an order to enforce access[66] or an order for or variation of support.[67]

The distinctive nature of access orders influence the choice of enforcement measure. Denial of access is different from refusal to pay a judgment debt, and different interventions may be appropriate depending on the nature of the case. Some cases of access denial involve custodial parents in conflictual relationships who are hostile to access from the outset and try to thwart it, sometimes using unproven allegations of violence, sexual abuse of the child or other problematic behaviour.[68] Some cases involve custodial fathers who have obtained custody by intimidating the mother and then deny her access,[69] or who deny access in an apparent attempt to control the mother or to punish her for leaving or for forming a relationship with another person.[70] In some

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[63] *C.M.C.* v. *G.W.C.*, [1997] B.C.J. No. 913 (S.C.); *R.C.P.C.* v. *J.B.D.*, [1997] B.C.J. No. 1657 (S.C.): custodial mother objected to supervision by the non-custodial father's parents, on the grounds that they drank to excess, smoked despite the children's respiratory problems, were dysfunctional and unstable, and denied that their substance-abusing and hostile son had any problems; court ordered access subject to supervision by a person agreed to by the custodial mother.

[64] *D.S.* v. *S.T.S.*, [1997] O.J. No. 4061 (Q.L.)

[65] *K.F.(D.) P.* v. *K.W.D.*, [1992] N.B.J. No. 234 (Q.B. Fam. Div.).

[66] *Tanner* v. *Madore*, [1992] N.J. No. 233.

[67] *Al-Maghazachi* v. *Dueck*, [1995] M.J. No. 406 (C.A.); *Lee* v. *Lee* (1990), 29 R.F.L. (3d) 417 (B.C.C.A.); *Thompson* v. *Brown*, [1997] B.C.J. No. 2538 (S.C.).

[68] See, for example, *Dombroski* v. *Dombroski*, [1993] A.J. No. 243 (Q.B.)., *D.S.* v. *S.T.S.*, [1997] O.J. No. 4061 (Q.L.); *C.C.* v. *L.B.*, [1995] N.J. No. 386 (U.F.C.); *Hayes* v. *Hayes* (1990), 82 Nfld, & P.E.I.R. 299.

[69] See, for example, *Alstrup* v. *MacDougall*, [1998] N.S.J. No. 543 (Fam. Ct.); *D.A.* v. *T.L.A.*, [1996] O.J. No. 77 (Gen. Div.).

[70] See, for example, *Salamon* v. *Salamon*, [1997] O.J. No. 852 (Gen. Div.); *Bubis* v. *Jones*, [2000] O.J. No. 1310 (Sup. Ct. Just.).

cases, access is denied because the non-custodial parent demonstrates hostility to the custodial parent, does not address the needs of the children during access visits, and causes the children to fear and resist visits.[71] Some cases involve custodial mothers who deny access because of proven abuse or a real concern about abuse by the non-custodial father against the custodial mother or the child or both.[72] As noted above, these high conflict and "difficult" cases should be identified at the outset and special measures used to deal with them.

In some cases, access is denied on a particular occasion because of a child's illness or some other temporary situation. Relatively minor grievances, such as failure to return the child's clothes or medication after an access visit, might precipitate access denial. In some cases, the child may not want to continue with the same access schedule because of a conflict with his or her activities. Some cases of access denial involve custodial mothers who have a new partner who fills the paternal role.[73] Some involve custodial mothers who have an opportunity for a better job, family support or a new partner that the access arrangement would jeopardize.[74] In many such cases, the parents could solve the dispute and work out a new access arrangement, when appropriate, perhaps with some assistance from a mediator or other person.

The different circumstances in which access denial arises call for different legal interventions. Generally, the best interests of the child standard will support an incremental application of enforcement measures, under which alternative approaches are stressed and compensatory remedies are used initially. When access denial persists, remedies become more coercive and punitive. The use of coercive or punitive measures is problematic when there are good reasons for non-compliance (e.g. abuse or hostility by the non-custodial parent that causes the child to fear and resist visits). In such cases, it may be in the best interests of the child to vary the order to reduce or eliminate access; it is open to custodial parents to seek such a variation.[75]

3.3.1 Defining Wrongful Access Denial

Access orders involve ongoing relationships in which flexibility is required from all parties. On occasion, it is appropriate not to comply with an access order. Although access may generally be in the child's best interests, on some occasions it may not be and denial, therefore, is justified (e.g. because the child is ill or the non-custodial parent is intoxicated).

As noted in Appendix A, Newfoundland, the Northwest Territories, Nunavut and Saskatchewan laws explicitly provide measures to deal with wrongful access denial, and Newfoundland's statute includes a detailed provision on when access denial is not wrongful. Ontario enacted a provision almost identical to Newfoundland's but it has never been proclaimed. Alberta has

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[71] *Hume* v. *Hume* (1989), 79 Nfld. & P.E.I.R. 114 (P.E.I. S.C.T.D.).

[72] *K.F.(D.) P.* v. *K.W.D.*, [1992] N.B.J. No. 234 (Q.B. Fam. Div.): mother denied father access because he sexually abused child; *Pollastro* v. *Pollastro*, [1999] O.J. No. 911 (C.A.): mother brought child to Ontario from California because of father's severe violence and abuse of the mother; *B.A.* v. *D.M.A.*, [1996] O.J. No. 352 (Gen. Div.); *Cooper* v. *Cooper*, [1995] A.J. No. 617 (Q.B.): mother denied father access after father was charged with assaulting 14 year old daughter with cerebral palsy; father also threatened professional helper to daughter; father previously convicted of assaulting mother; child welfare authorities recommended that access be denied or supervised; judge ordered unsupervised access.

[73] See, for example, *Frame* v. *Smith*, [1987] 2 S.C.R. 99.

[74] See, for example, *Lund* v. *Gabe*, [1995] B.C.J. No. 1903 (S.C.).

[75] *Hume* v. *Hume* (1989), 79 Nfld. & P.E.I.R. 114 (P.E.I. S.C.T.D.).

enacted legislation that provides a court to refuse to enforce an access order in cases in which a denial of access is "excusable," without defining the term. Alberta's provision permits a court to enforce an access order with non-punitive measures even when denial is "excusable." This may be problematic when non-custodial parents use enforcement measures to harass the other parent. Under Alberta's provision, a custodial parent who has denied access for a good reason (e.g. because the non-custodial parent was intoxicated) may be ordered to provide compensatory access, attend an educational program or counselling, attend mediation, or reimburse the non-custodial parent for expenses incurred as a result of the access denial. However, in cases of harassment, the court can deal with frivolous or vexatious applications by prohibiting the parent from making any further applications without leave of the court.

Although few Canadian jurisdictions have explicitly dealt with justified access denial in their laws, courts have discretion to excuse denial of access in some circumstances, as discussed in *Frame* v. *Smith* by Wilson J.:

> At times, a perfectly legitimate exercise by the custodial parent of his or her custodial rights or custodial obligations will result in an individual denial of access to the other parent. It is not the role of the court to review this sort of exercise of discretion with respect to the child. It is only when a sustained course of conduct designed to destroy the relationship is being engaged in that there is a breach of the duty. If and when a custodial parent comes to believe that continued access to the child by the other parent is not in the child's interests or is harmful to the child, the proper course for the custodial parent to follow is not to engage in ongoing wilful violations of the access order but to apply to the court to vary or rescind it.[76]

Some cases suggest that denial of court-ordered access may be justified when the custodial parent reasonably and honestly believes that there is a risk of danger to the child and takes immediate court action to terminate or restrict access.[77] In *Salloum* v. *Salloum*, Viet J. said: "Where the court can find that a parent is disobeying a court order out of honest concern for the welfare of the children, a court will be loathe to stigmatize and sanction the parent's behaviour. One test for the honest concern of the offending parent is whether that parent has promptly moved the court to modify the existing custody or access order."[78]

There are three problems with this approach to "justified" denial of access. First, it suggests that access denial is appropriate only when circumstances justifying a variation of the custody or access order exist. Yet in many cases such circumstances do not exist, the access order is still in the best interests of the child, but on a particular occasion denial of access was appropriate. It would be useful to untangle cases where a variation is appropriate (e.g., because access as ordered is no longer in the best interests of the child) from those where access as ordered remains in the best interests of the child generally but denial was appropriate on a particular occasion. In the former, the custodial parents should seek a variation immediately, as the cases suggest. In the latter, an application to vary should not be required or expected, and the court should rule

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[76] *Frame* v. *Smith*, [1987] 2 S.C.R. 99, at para. 84.

[77] *Matter of the Law Society, Re Solicitor*, September 29, 1993, Report and Decision of the Discipline Committee of the Law Society of Upper Canada, excerpted in J.G. McLeod, 1992:10-9-10.10.3. See also J.G. McLeod's annotation to *M.(B.P.)* v. *M. (B.L.D.E.)* (1992), 42 R.F.L. (3d) 349 (Ont. C.A.).

[78] *Salloum* v. *Salloum* (1994), 154 A.R. 65 at para. 19 (Q.B.).

that the denial was justified and dismiss any enforcement proceedings, as suggested in the excerpt from *Frame* v. *Smith*, above.

A statutory guideline such as that provided in Newfoundland's *Children's Law Act* is helpful. The Newfoundland statute makes clear that a remedy is available only when a denial of access is "wrongful," and provides a definition of this term.[79] Newfoundland's statute gives parents a clear statement of their rights and responsibilities related to the exercise of access. The custodial parent knows, for example, that when the non-custodial parent is more than an hour late, he or she need not stand by with the child, ready, willing and able to provide access. The non-custodial parent knows, for example, that when he or she arrives intoxicated, access will be denied. While there will continue to be disagreements on such issues as whether there were "reasonable grounds" to believe that the child would suffer harm if access were exercised, this provision adds needed clarity to the issue of justified access denial. In addition, this provision expands the circumstances under which access denial will be justified to include more than immediate risk of harm to the child. This is appropriate because it allows the court to focus on the best interests of the child not simply the risk of harm to the child, and because it clarifies that the custodial parent will not be found in contempt when, for example, he or she has not continued to be ready to provide access after repeated failures by the non-custodial parent to exercise access.

All provinces and territories should enact a provision that defines when access denial is wrongful, and should provide remedies for access denial only when it is wrongful.

3.3.2 Compensatory Remedies

As noted in Appendix A, compensatory access is explicitly provided for in the legislation of Alberta, Newfoundland, the Northwest Territories, Nunavut and Saskatchewan. Amendments to Ontario's statute that have never been proclaimed include a provision for compensatory access. Even in the absence of such explicit authority, courts have ordered compensatory access under their general power to make or vary custody and access orders under provincial or territorial legislation,[80] under the federal *Divorce Act* [81] or without reference to any specific statutory authority.[82] Orders for compensatory access should be subject to the best interests of the child principle. As Matheson J. said in *Hume* v. *Hume*, when rejecting a request for compensatory access, "visitation is for the benefit of the child. It is not a debt owed by the petitioner to the respondent which must be paid in full."[83] Most courts explicitly consider whether compensatory access is in the best interests of the child before making such an order.[84] Some courts order, or

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[79] *Children's Law Act*, R.S.N. 1990, c. C-13, s. 41(4). The *Children's Law Reform Act*, R.S.O. 1990, c. C.12, s. 34a(4) (not proclaimed) is almost identical.

[80] *P.H.* v. *D.G.*, [1994] O.J. No. 2747 (Prov. Div.): order for compensatory access made under the *Children's Law Reform Act*, R.S.O. 1990, c. C.12, s. 24.

[81] *Huber* v. *Flegel*, [1992] S.J. No. 278 (Q.B.): order for compensatory access made under the *Divorce Act*, R.S.C. 1985 (2nd Supp.) c. 3, s. 16.

[82] *Amaral* v. *Myke* (1992), 42 R.F.L. (3d) 322 (Ont. U.F.C.).

[83] *Hume* v. *Hume* (1989), 79 Nfld. & P.E.I.R. 114 (P.E.I. S.C.T.D.).

[84] *Drake* v. *Cox* (1993), 336 A.P.R. 219 (Nfld. Prov. Ct.).

suggest, that there be ongoing compensatory access, as appropriate, leaving it to the parties to arrange it between themselves.[85]

Compensatory access should be explicitly available as an immediate remedy when a wrongful denial of access is proven on the balance of probabilities, subject to the best interests of the child. Civil enforcement of access orders is primarily a matter of provincial responsibility under section 92(13) of the *Constitution Act*.[86] However, the *Divorce Act,* as well as all provincial and territorial legislation, should explicitly authorize courts to order compensatory access. This is because such an order may be appropriate when determining access under the *Divorce Act*, when access as previously agreed to or ordered has been wrongfully denied.

In 1987, the Supreme Court of Canada ruled that tort actions for denial of access are not available in Canada.[87] More recently, the Alberta Court of Appeal held that a non-custodial father had no common-law cause of action against the custodial mother for interfering with his access rights.[88] Some commentators have supported the use of tort actions for access denial (Geismann, 1993: 606-608), but there does not seem to be any evidence that they are effective in re-establishing contact between the child and the non-custodial parent or in supporting the rights and bests interests of the child.

A more effective means of enforcing access while, at the same time, compensating the non-custodial parent is to allow non-custodial parents to bring summary claims for expenses incurred as a result of a wrongful access denial. As noted in Appendix A, compensation for an expense relating to access denial is explicitly available under the statutes of Alberta, Manitoba, Newfoundland, the Northwest Territories, Nunavut and Saskatchewan.

Newfoundland's statute allows the court to remedy a wrongful denial of access by ordering the respondent "to reimburse the applicant for reasonable expenses actually incurred as a result of the wrongful denial of access."[89] Saskatchewan's *Children's Law Act* provides that the court may award expenses incurred by the applicant, including "(a) travel expenses; (b) the costs of locating and returning a child; (c) lost wages;... (e) legal fees; and (f) any other expenses the court may allow."[90] Some Saskatchewan judges have used their jurisdiction to award costs in contempt proceedings to award compensation to the non-custodial parent for expenses incurred while trying to exercise access.[91] Alberta law provides compensation to non-custodial parents for any "necessary expenses actually incurred as a result of denial of access" and says that "necessary expenses" include "(a) travel expenses; (b) the costs of locating and securing access to the child; (c) lost wages; (d) any other expenses the court may allow."[92] The amendments to

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85 *Brecht* v. *Martin*, [1996] S.J. No. 377 (Q.B.); *K.M.S.* v. *E.Z.*, [1997] S.J. No. 361 (Q.B.).

86 *Constitution Act 1867*, (U.K.), 30 & 31 Vict. C. 3, reprinted in R.S.C. 1985, Appendix II, No. 5.

87 *Frame* v. *Smith*, [1987] 2 S.C.R. 99.

88 *Sturkenboom* v. *Davies* (1996), 25 R.F.L. (4th) 173 (Alta. C.A.).

89 *Children's Law Act*, R.S.N. 1990, c. C-13, s. 41(2)(c).

90 *The Children's Law Act*, S.S. 1990-91, c. C-8.1, s. 27.

91 *Paton* v. *Shymkiw* (1996), 114 Man. R. (2d) 303 (Q.B. [Fam. Div.]): custodial mother ordered to pay "any reasonable expenses actually incurred as a result of the wrongful denial of access... including any fees that had to be paid to... the access supervisor" under the Manitoba Court of Queen's Bench Rules, Reg. 553/88, r. 60.10(5)(e), which allows a court to order a person in contempt to pay such costs as seem just.

92 *Family Law Statutes Amendment Act*, 1999, S.A. 1999, c. 22, ss. 61.1(2), 61.3(3) and (7)(d).

Ontario's statute, which have never been proclaimed, included a provision for compensation of the non-custodial parent for "any reasonable expenses actually incurred as a result of wrongful denial of access."[93]

Apart from such explicit statutory authority, some judges have used their general powers to award costs[94] or to punish contempt[95] to award the expenses the non-custodial parent incurred trying to exercise access. Some judges order compensation for wasted expenses in the event that access denial occurs.[96] Courts should be given the explicit jurisdiction to award compensation in summary proceedings for expenses incurred in attempting to obtain access or for wasted expenses (e.g. the cost of unused baseball tickets purchased for the access visit) when wrongful denial of access is proven on the balance of probabilities.

3.3.3 Apprehension Orders

When unjustified access denial persists after preventive, alternative and compensatory measures have been taken, more coercive and punitive measures may be called for to protect the best interests of the child.

As indicated in Appendix A, Manitoba, New Brunswick, Newfoundland, the Northwest Territories, Nunavut, Ontario, Prince Edward Island and Yukon have given statutory power to courts to authorize a person entitled to access, or someone acting on that person's behalf, to apprehend the child to carry out the access order. These same jurisdictions, along with Alberta and Saskatchewan, empower courts to direct a law enforcement officer to locate, apprehend and deliver the child to the person entitled to access.

In some cases, courts have refused to grant an order authorizing apprehension on the grounds that such an order would not be in the best interests of the child. In *Kingwell v. Kingwell*, the court declined to authorize the non-custodial father, or someone acting on his behalf, to apprehend the child for the purpose of enforcing the access order since there was no danger to the children in leaving them with their mother.[97] Similarly, in *D.(R.P.)* v. *C.(R.)*, the court declined the father's request for an apprehension order; rather, the court chose to give the mother an opportunity to comply with the access order. The court was of the view that an apprehension order would be particularly intrusive and potentially upsetting for the child and out of proportion to the good that might be achieved by allowing her to be with her father for the stated periods of

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[93] *Children's Law Reform Act*, R.S.O. 1990, c. C.12, s. 83 (not yet proclaimed in force).

[94] *L.B.* v. *R.D.* (1998), 35 R.F.L. (4th) 241 (Ont. Prov. Div.): custodial mother ordered to pay the father, who had appeared on his own behalf, $300 costs, and to pay $60 for each of the father's three non-professional witness, and $200 for the father's one professional witness.

[95] *Paton* v. *Shymkiw* (1996), 26 R.F.L. (4th) 22 (Man. Q.B. [Fam. Div.]): custodial mother ordered to pay "any reasonable expenses actually incurred as a result of the wrongful denial of access... including any fees that had to be paid to... the access supervisor" under Manitoba Court of Queen's Bench Rules, Reg. 553/88, r. 60.10(5)(e), which allows a court to order a person in contempt to pay such costs as seem just.

[96] *Irmya* v. *Narso*, [1996] O.J. No. 2501 (Prov. Div.): mother ordered to pay for father's return fare to and from California when father has paid for such fare and subsequently the access visit is cancelled.

[97] *Kingwell v. Kingwell* (1991), 35 R.F.L. (3d) 373 (Ont. Gen. Div.).

access. The court made it clear, however, that the mother could be imprisoned if her contempt of the access order continued.[98]

While courts have granted orders directing apprehension by law enforcement officers,[99] they have also refused to grant such orders on the grounds that it would not be in the best interests of the child. In *Whipp* v. *Racz*, the father's request for an order directing police assistance to enforce access was dismissed on the basis that it would be detrimental to the best interests of the children to see police officers at the time of the access exchanges, and that such an order should be made only as a last resort.

British Columbia's statute gives no statutory authority for directing apprehension by a law enforcement officer to enforce an access order.[100] In *M.* v. *M.*, the British Columbia Supreme Court said that an apprehension order would be "traumatic" for the parents' 11-year-old daughter, and that the fact that the father had requested such an order reflected negatively on his ability to parent. The Court said that the father was "considering his own parental rights above the interests" of his child.[101] In *Drake* v. *Cox*, a Newfoundland court refused to grant the non-custodial father an "apprehension order" on the grounds that "it would be particularly intrusive and potentially upsetting for the child, and out of proportion to the good that might be achieved by allowing her to be with the father."[102]

Non-custodial parents also hesitate to use apprehension to enforce their access rights. In *Paton* v. *Shymkiw*, for example, the father, accompanied by an access supervisor, tried to pick up his six-year-old son for an access visit but the child refused. Although the judge "had ordered police assistance if it became necessary, the father agreed at that time that calling the police was not in Tyler's best interest."[103] Only after repeated refusals by the child (for which the judge held the custodial mother responsible) did the father seek assistance from the police.

Although an apprehension order is an intrusive and potentially frightening method of enforcing access orders, such an order may be appropriate in some circumstances, when other methods have failed. When unjustified access denial persists after the court has ordered persuasive, educational and compensatory measures, the child's interest in maintaining a relationship with the non-custodial parent may outweigh the risks involved in using this coercive measure in some cases.

In 1997, an Ontario judge made the following points when upholding a police apprehension order made under Ontario's *Children's Law Reform Act*, s. 36:

> It is clear that an order under subsection 36(2) is an order of last resort. Courts must make such orders sparingly and in the most exceptional circumstances. It is an order that can only be made once a court is satisfied that a party is unlawfully withholding a child from a person entitled to custody of or access to the child. It is a finding that can be

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98 *D.(R.P.)* v. *C.(R.)* (1993), 107 Nfld. & P.E.I.R. 219, 336 A.P.R. 219 (Nfld. Prov. Ct.).

99 *Cromwell* v. *Cromwell*, [1994] O.J. No. 245 (Gen. Div.); *Green* v. *Beaulieu* (1988), 54 Man. R. (2d) 74 (Q.B.).

100 *Agee* v. *Vellani*, [1991] B.C.J. No. 3927 (Prov. Ct.).

101 *M.* v. *M.*, [1996] B.C.J. No. 1161 at para. 28 (Q.L.) (S.C.).

102 *Drake* v. *Cox* (1993), 107 Nfld. & P.E.I.R. 219 (Nfld. Prov. Ct.).

103 *Paton* v. *Shymkiw* (1996), 26 R.F.L. (4th) 22 at para. 14 (Man. Q.B.[Fam. Div.]).

> based on either a single incident of withholding or on a pattern of withholding even where that pattern has been interrupted by some resumed access. Subsection 36(7) provides for a period of time within which the police may be called upon to assist an aggrieved party in enforcing access. The purpose of that subsection is to enable the aggrieved party to avoid the expensive process of returning to court for a finding of unlawful withholding on each and every occasion that the party is being denied access. Ideally, the making of the order should be effective enough to persuade the wrongdoer to co-operate. However, that is not always the case and the aggrieved party must call upon the police.[104]

Law enforcement officers have expressed concerns about enforcing access orders.[105] It has been pointed out that notice of an application for an apprehension order should be given to any third parties, including law enforcement officers, who may be granted rights or have obligations imposed on them. Such notice "can act as a safeguard in cases where, if the court had information in the hands of the peace officers, police departments and/or child protection agencies, there might be concerns about granting an order..." (MacPhail, 1999: 14). In *Allen* v. *Grenier*, the police moved to set aside a police apprehension order obtained by the non-custodial father, arguing that "the order contained insufficient information for enforcement purposes, that it did not specify particular police measures to be used, that it lacked an expiry date, and that it was a drain on resources." The court ruled that when a police officer is directed to apprehend a child, the officer must make reasonable efforts to carry out the order or, when the order requires explanation, the officer must immediately bring a motion before the court for directions and then act on those directions. The court rejected the argument relating to resources on the basis of the statutory authority to make apprehension order.[106] The case points to the need for clear access and apprehension orders. Standardized orders clearly setting out the necessary information would alleviate problems. The case also makes clear that there is a need for adequate funding for officers to receive training and be available for apprehension of children who are being wrongfully withheld.

Vince Westwick, representing the Canadian Association of Chiefs of Police, testified before the Special Joint Committee about "doorstep problems" (i.e. difficulties that arise when an officer tries to resolve a volatile access dispute situation at the doorstep). To avoid disputes about the meaning of orders, he requested that access orders be clarified and written in non-legal language with the dates of access clearly spelled out. As well, he recommended that there be legislative provision for professionals and police to have access to the complete file relating to the case off-hours (Canada, 1998b).

To alleviate the potential trauma, apprehensions should be conducted by trained personnel and the same personnel should be involved when repeat apprehensions are required. Persuasion should be the primary method used, and the apprehension should be an opportunity to provide additional education to the custodial parent on behaviour that promotes the best interests of the child. An apprehension order should be available when unjustified access denial is proven on the balance of probabilities and when such an order is consistent with the best interests of the child.

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104 *Allen* v. *Grenier* (1997), 145 D.L.R. (4th) 286 (Ont. Gen. Div.), at para. 38.
105 *Re Leponiemi and Leponiemi* (1982), 35 O.R. (2d) 440 (C.A.).
106 *Allen v. Grenier* (1997), 145 D.L.R. (4th) 286 (Ont. Gen. Div.).

In most cases, however, apprehension orders should be given or enforced only after less coercive measures have been tried. Apprehension orders should be specific and clearly worded.

3.3.4 Contempt

As indicated in Appendix A, section 127(1) of the *Criminal Code*, imposes a penalty for criminal contempt "unless a punishment or other mode of proceeding is expressly provided by law."[107] In *R.* v. *Clement*, the Supreme Court of Canada ruled that section 127(1) could be applied when court orders have not been obeyed, and that the inherent power of a superior court to punish contempt does not constitute another "mode of proceeding" that was "expressly provided by law," so as to negate the availability of a criminal contempt charge.[108] The Supreme Court said that section 127(1) was "available as the basis for a charge for disobedience of a lawful court whenever statute law (including regulation) does not expressly provide a punishment or penalty or other mode of proceeding, and not otherwise."[109]

The Nova Scotia Court of Appeal subsequently ruled in *R.* v. *Dawson* that a person cannot be liable for criminal contempt when the order in question was made by the Family Court pursuant to the *Family Maintenance Act*,[110] which expressly provides for punishment for contempt of an order made under the Act.[111] As indicated in Appendix A, legislation in many provinces expressly provides for punishment for contempt of access orders. When access orders are obtained from courts whose jurisdiction derives from provincial or territorial legislation that expressly provides for punishment for contempt, a charge under section 127 of the *Criminal Code* is available (Wilton & Miyauchi, 1989: 2-25-2-26). For example, a charge under section 127 could not be laid in Ontario for contempt of an access order made by the Ontario Court of Justice because section 38 of the *Children's Law Reform Act* expressly provides a penalty. However, a charge under section 127 probably would be available for non-compliance with an access order made by the Superior Court of Justice under the *Divorce Act*. Ontario's Rules of Civil Procedure (Rule 60(5)) authorize the judge to order imprisonment, a fine and other penalties for contempt of a court order, but may not provide sufficiently express penalties to satisfy the standard set out in Rv. *Clement*.

In some contexts, then, a charge under section 127 of the *Criminal Code* will be available; the question is when is such a charge appropriate? The Manitoba Department of Justice developed charging guidelines for cases of breach of custody and access orders that are based on the policy that parties should generally pursue civil remedies rather than use the criminal justice system, and that take into account "the negative impact on the children involved if criminal charges are brought against one parent" (MacPhail, 1999: 11-12).[112] These guidelines take the best interests of the child into account according to the circumstances of the case and generally posit criminal sanctions as a remedy of last resort.

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[107] *Criminal Code*, R.S.C. 1985, c. C-46, s. 127(1).

[108] *R.* v. *Clement*, [1981] 2 S.C.R. 468.

[109] *R.* v. *Clement*, [1981] 2 S.C.R. 468.

[110] *Family Maintenance Act*, R.S.N.S. 1989, c. 160, s. 41.

[111] *R.* v. *Dawson*, [1995] N.S.J. No. 306 (C.A.). The *Dawson* case was appealed to the Supreme Court of Canada, but not on that issue: *R.* v. *Dawson*, [1996] 3 S.C.R. 783.

[112] Note that these apply to charges under section 50(1) of *The Family Maintenance Act* or section 127of the *Criminal Code*.

The primary method of dealing with denial of access has been civil contempt proceedings, as expanded by provincial and territorial legislation, which provides for fines or imprisonment for violation of an access order.[113] As indicated in Appendix A, most provinces and territories have legislated penalties for non-compliance with an access order, which vary in severity, and have extended to provincially appointed judges the power to punish contempt that is other than contempt of court. British Columbia, Prince Edward Island and Yukon have not enacted such legislation but should consider doing so.[114] In British Columbia and Manitoba interference or non-compliance with an access order is a provincial offence.

Because the contempt remedy is a quasi-criminal remedy, punishable by fine or imprisonment, the standard of proof is beyond a reasonable doubt.[115] The court will not hold a person in contempt unless the person intended to frustrate the order. There must wilful and deliberate breach of the order.[116] It is unusual to do more than issue "a warning, admonition or penalty in costs" for the first failure to comply with an access order,[117] and generally a parent will not be found in contempt unless there has been persistent failure to comply.[118] Courts are reluctant to punish a custodial parent by fine or imprisonment when it is clear that such sanctions will not address the underlying problems and that counselling is needed.[119]

Many courts have stated that the custodial parent has a duty to actively encourage visits with the non-custodial parent.[120] A custodial parent who encourages or condones a child's refusal of access,[121] or who deliberately schedules activities to conflict with access, may be held in contempt.[122]

None of the statutes or regulations addressing the court's power to punish for contempt requires that the best interests of the child be a primary consideration. Nevertheless, many courts have

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[113] See, for example, *O'Byrne* v. *Koresec* (1986), 2 R.F.L. (3d) 104 (B.C.S.C.): court ordered custodial mother to pay $350 fine or spend seven days in jail for default of payment; *Drake* v. *Cox* (1993), 107 Nfld. & P.E.I.R. 219 (Nfld. Prov. Ct.): court ordered custodial mother to pay $100 fine; *L.B.* v. *R.D.* (1998), 35 R.F.L. (4th) 241 (Ont. Prov. Div.): court ordered 60 days imprisonment for custodial mother); *Rawlinson* v. *Rawlinson* (1986), 5 R.F.L.(3d) 166 (Sask. Q.B.): court ordered seven days imprisonment for non-custodial mother who had committed "repeated, flagrant and deliberate breaches of various orders" when she entered the custodial father's house and contacted the children in violation of terms of access order.

[114] Yukon has enacted such a provision in relation to failure to comply with a support order: *Family Property and Support Act*, R.S.Y. 1986, c. 63, s. 53.

[115] *Paton* v. *Shymkiw* (1996), 26 R.F.L. (4th) 22 (Man. Q.B. [Fam. Div.]); *B.* v. *D.* (1998), 35 R.F.L. (4th) 241 (Ont. Prov. Div.); *Burgoin* v. *Burgoin* (1997), 35 R.F.L. (4th) 135 (Alta. C.A.). In Quebec, see the *Code of Civil Procedure of Quebec*, L.R.Q., c. C-25, article 53.1.

[116] *Smith* v. *Smith*, 164 Sask. R. 50 (Q.B.).

[117] *Halas* v. *Halas*, [1998] B.C.J. No. 1515 (C.A.), para. 11; *Marcil* v. *Stedmann*, [1999] B.C.J. No. 2602 (S.C.), which followed *Halas* v. *Halas* and issued warning for first non-compliance.

[118] *Stupple* v. *Quinn* (1990), 30 R.F.L. (3d) 197 (C.A.).

[119] *Reithofer* v. *Dingley*, [2000] O.J. No. 1132 (Sup. Ct. Just.).

[120] *White* v. *White*, [1999] N.S.J. No. 312 (S.C.); *Reithofer* v. *Dingley*, [2000] O.J. No. 1132 (Sup. Ct. Just.); *R.L.G.* v. *S.A.F.*, [1999] S.J. No. 507 (Q.B. (Fam. L. Div.)).

[121] *Droit de la famille—1120*, [1987] R.D.F. 478 (C.S.).

[122] *Paton* v. *Shymkiw* (1996) 26 R.F.L. (4th) 22 (Man. Q.B. [Fam. Div.]); *L.(M.)* v. *R.(K.)*, [1996] W.D.F.L. 116 (Ont. Prov. Div.).

expressed reluctance to punish the custodial parent for contempt because of concerns about the interests of the child. Veit J. has said the following:

> Restraint is appropriate given the twin objectives of protecting both the best interests of the children and the administration of justice. As frustrating as it must be for a parent whose court ordered access is sterilized, the court's focus is on the interest of the children, not on the behaviour of the parents. Children are better off if the parents are not in jail or paying fines.[123]

Because of concerns about the interests of the child, courts only rarely fine or imprison a custodial parent for contempt. Punishment may increase animosity between the parents and exacerbate access disputes (McLeod, 1987: 458).[124] Therefore, punishment for contempt is not an effective method of enforcing access orders.

To protect the best interests of the child, punishment for contempt generally should be imposed only as a last resort after persuasive and compensatory methods have failed, and not when the punishment would undermine rather than protect the child's interests. For contempt proceedings to be an effective deterrent, however, a fine or imprisonment should be imposed for persistent non-compliance, subject to the best interests of the child.

3.3.5 Suspension of Child Support and Change of Custody

Two methods of access enforcement should be abandoned on the grounds that they violate the best interests and the rights of the child. They are suspension of child support and transfer of custody.

There has been some academic support for making child support conditional on access (e.g. Kitch, 1991: 318).[125] No provincial or territorial statutes explicitly authorize courts to suspend child support to enforce an access order. However, some courts have suspended child support payments pending resumption of access.[126] The Appeal Division of the P.E.I. Supreme Court stated that cancellation of child support was a measure the court could take if a custodial parent failed to adequately facilitate access.[127] Most courts, however, have rejected this

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[123] *Salloum* v. *Salloum* (1994), 154 A.R. 65 (Q.B.).

[124] Dave Whiteman, past president of Capital Area Fathers for Equal Rights, a Michigan fathers' rights group, and previous client of the Michigan Friend of the Court program, commented that working out access disputes through mediation and counselling was preferable to jailing the custodial parent for contempt because a jail term makes the custodial parent angry and does not resolve the problems (interview, April 13, 2000).

[125] Kitch proposes a rigid four-step process of access enforcement. For the first instance of wrongful access denial, compensatory access would be automatically ordered, for the second there would be an automatic jail sentence, for the third the withholding of child support would be automatic, and for the fourth wrongful denial there would be an automatic transfer of custody. A poll conducted by the Angus Reid Group found that 7 out of 10 people in Ontario say child support payments should be withheld from mothers who deny access ("Poll Addresses Child Access," The *Globe & Mail*, May 25, 1998).

[126] *R.L.G.* v. *S.A.F.*, [1999] S.J. No. 507 (Q.B. (Fam. L. Div.)); *Casement* v. *Casement* (1987), 81 A.R. 76 (Q.B.); *Harrison* v. *Harrison* (1987), 51 Man. R. (2d) 16 (Q.B.); *Brownell* v. *Brownell* (1987), 9 R.F.L. (3d) 31 (N.B.Q.B. [Fam. Div.]).

[127] *Paynter* v. *Reynolds* (1997), 157 Nfld. & P.E.I.R. 336 at para. 36 (S.C. App. Div.).

approach, including British Columbia's Court of Appeal, which stated the following in *Lee* v. *Lee*:

> I do not consider that even this custodial parent's reprehensible conduct, in pursuing her personal objective, contrary to the best interests of the child, justifies a diminution of the responsibility of the non-custodial parent for the proper maintenance of the child of the marriage. Accordingly, in my view, the misconduct of the custodial parent does not provide a proper reason for directing that the non-custodial parent pay less than the appropriate amount of maintenance for his child.[128]

Suspension of child support is inconsistent with the best interests of the child principle and should not be ordered as a remedy for wrongful access denial (at the same time, suspension of access should not be ordered as a remedy for failure to pay child support). It results in a violation of the child's right to access *and* to support, and implies that the custodial parent may bargain away the child's rights in order to purchase freedom from an ex-spouse, that his or her right to be let alone outweighs the child's rights. The Supreme Court of Canada has made clear that "child maintenance, like access, is the right of the child.... For this reason, a spouse cannot barter away his or her child's right to support." If financial sanctions are deemed appropriate for wrongful denial of access, the court should impose a fine for contempt or order the custodial parent to give security for performance of the obligation to provide access,[129] rather than allow the custodial parent, in effect, to bargain away the child's right to support.

As noted in Appendix A, Saskatchewan is the only province in which, in the case of wrongful denial of access, the court may vary a custody or access order, provided the court "is of the opinion that it is in the best interests of the child." Nevertheless, many courts have said that a transfer of custody may be ordered as a remedy for denial of access. Steel J. stated that "there are a number of ways in which a court can deal with a party who is in contempt of an access order to a child including a fine, a period of incarceration, *a change of custody*, ordering additional access periods or suspending child support payments."[130] In an appeal from Quebec, the Supreme Court of Canada upheld an order to transfer custody when the mother had taken the child to France in violation of the father's access order.[131]

England's Law Commission suggested that "the possibility of a variation in the custody order may prove a more effective sanction," for denial of access, but acknowledged that "the cure may be worse than the disease" (England and Wales, 1986: 2.57). In a similar vein, Wilson J. said the following in *Frame* v. *Smith*:

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[128] *Lee* v. *Lee* (1990), 29 R.F.L. (3d) 417 at 421 (B.C.C.A.). See also, *Thiele* v. *Thiele*, [1998] B.C.J. No. 2214 (S.C.); *Jones* v. *Anhorn*, [1998] B.C.J. No. 1274 (S.C.).

[129] Alberta's and Saskatchewan's legislation expressly provide authority to order a parent to give security (*The Domestic Relations Act*, R.S.A. 1980, D-37, s. 61.3(3)(b); *The Children's Law Act*, S.S. 1990-91, c. C-8.1, s. 26(1)(c)). See also, *Armaral* v. *Myke* (1992), 42 R.F.L. (3d) 322 (Ont. U.F.C.): custodial mother, who was in contempt of an access order, was ordered to enter into a $2,000 recognizance and to facilitate access.

[130] *Paton* v. *Shymkiw* (1996), 114 Man. R. (2d) 303 at para. 41 (Q.B. [Fam. Div.]) (My emphasis). See also, *Paynter* v. *Reynolds* (1997), 157 Nfld. & P.E.I.R. 336 at para. 36 (S.C. App. Div.).

[131] *M.P.* v. *G.L.B.*, [1995] 4 S.C.R. 592.

> It is sometimes suggested that transferring custody is an appropriate means of punishing the custodial parent for an ongoing denial of access.... But again, because of the bonding that takes place between the custodial parent and his or her child over a period of time, such a step may not be in the child's best interests.[132]

Although some courts justify such transfers on the basis that the custodial parent's thwarting of access is harmful to the child and shows clear disregard for the interests of the child, too much emphasis on that factor creates the risk that the child's interests will not be fully considered. A transfer of custody should not be considered a "punishment" or a remedy for wrongful access denial. In many cases, it will not be an option because the non-custodial parent does not want or is unable to take custody. Even when the non-custodial parent does seek a transfer of custody, it may not be appropriate. If there is persistent wrongful denial of access, or other cause for concern, the non-custodial parent may apply for a transfer of custody. The judge would then have to decide whether a variation was in the best interests of the child given all the circumstances.

As in any application to vary a custody or access order, the non-custodial parent would have to prove "1) a change in the condition, means, needs or circumstances of the child and/or the ability of the parents to meet the needs of the child; 2) which materially affects the child; and 3) which was either not foreseen or could not have been reasonably contemplated by the judge who made the initial order."[133] If this threshold is met, the court must then consider afresh what is in the best interests of the child, taking into account *all* relevant circumstances.[134] Several judges have correctly ruled that applications to vary custody in the context of access denial should be governed by the principles set out in the Supreme Court of Canada decision in *Gordon* v. *Goertz*.[135]

The statutory best interests of the child test, the current law of Canada on variation of custody and access orders, and the UN Convention on the Rights of Child do not support transfer of custody as an appropriate remedy for wrongful access denial. That a parent has wrongfully denied access is certainly an important factor to consider, along with all other relevant circumstances, on any variation application but is not, in itself, a sufficient basis on which to order a transfer of custody.

3.4 Remedies for Abduction

Abduction by a custodial parent is perhaps the most drastic method of denying access to the non-custodial parent. The RCMP's Missing Children's Registry prepares an annual report on the number of cases of children reported missing based on statistics from the Canadian Police Information Centre. The Registry's report for 1997 indicates that there were 433 parental abductions in Canada that year: 186 in Ontario; 78 in Quebec; 63 in British Columbia; 43 in Alberta; 21 in Manitoba; 16 in Saskatchewan; 11 in Nova Scotia; 5 each in New Brunswick and Prince Edward Island; 2 each in Yukon and the Northwest Territories; and 1 in Newfoundland (RCMP, 1997). An undetermined number of these abductions would be abductions by custodial

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132 *Frame* v. *Smith*, [1987] 2 S.C.R. 99.

133 *Gordon* v. *Goertz*, [1996] 2 S.C.R. 27 at para. 44.

134 *Ibid*, at para. 46.

135 *Gilmaine* v. *Gilmaine*, [1999] B.C.J. No. 104 (S.C.).

parents or primary caregivers. It is likely that in the majority of parental abductions from Canada to countries that are parties to the Hague Convention on the Civil Aspects of International Child Abduction, primary caregiver mothers are the abductors.[136]

Remedies for parental abduction are considered separately in this report because parental abduction calls for distinct approaches. The focus of interventions is location and return of the child. There are separate criminal sanctions for abduction and international organizations are involved in some cases. As well, there are distinct measures to prevent parental abduction.

3.4.1 Preventive Measures

As indicated in Appendix A, most jurisdictions have measures aimed at preventing a custodial parent from removing the child from the jurisdiction without notice. The *Divorce Act* authorizes a court to order that a custodial parent must provide at least 30 days' notice of a move as well as information on the date of the move and the child's new place of residence. Alberta has amended its *Provincial Court Act* to include a similar provision, which previously was only found in *The Domestic Relations Act*. Under Saskatchewan's legislation a court making a custody and access order under the Act must order the custodial parent to give notice to the non-custodial parent of a move and to furnish the new address. The mandatory nature of Saskatchewan's provision is problematic in cases of domestic violence, when requiring the custodial parent to furnish the new address may create a risk of harm. Saskatchewan should amend the provision to provide for an exception in such cases.[137]

Even in the absence of explicit statutory authority, courts have ordered custodial parents to give notice of a move and information on the new address, using their general powers to order custody and access subject to such terms and conditions as are in the best interests of the child.[138]

As indicated in Appendix A, legislation in Manitoba, New Brunswick, Newfoundland, the Northwest Territories, Nunavut, Ontario, Prince Edward Island, Saskatchewan and Yukon provide that a court, when satisfied that a person prohibited by court order or agreement from removing a child from the province or territory proposes to remove the child, to make an order requiring that person to a) transfer property to a trustee to be held subject to terms and conditions, b) make any child support payments to a trustee, c) post a bond payable to the applicant, or d) surrender his or her passport, the child's passport or other travel documents. Saskatchewan's law further provides that the court may vary or make a custody or access order in this context but does not say that this is subject to the best interests of the child. Saskatchewan's law should be amended to clarify that custody or access orders or variations in this context, as always, must be in the best interests of the child. Alberta, British Columbia,

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[136] There seemed to be general agreement that this was the case among representatives from various members states at the symposium "Celebrating Twenty Years: The Past and Promise of the 1980 Hague Convention on the Civil Aspects of International Child Abduction," February 25, 2000, New York University School of Law, New York.

[137] See, for example, Texas Family Code, c. 105, s. 105.006(c), which allows an exception to the general requirement that a party's change of address information be provided, when this would likely lead to "harassment, abuse, serious harm, or injury." To the child or parent

[138] *Flemmings* v. *Collet*, [1997] O.J. No. 1382 (Prov. Div.).

Nova Scotia and Quebec should consider enacting a provision similar to that of the other provinces and territories for cases of likely violations of a non-removal order or agreement.

3.4.2 Location of the Child

As indicated in Appendix A and discussed above, most provinces and territories provide orders directing law enforcement officers to locate and apprehend a child. These provisions may be invoked for abductions. As well, Appendix A indicates that the federal government and every province and territory, except Alberta, have enacted legislation about the release of information to help locating a child to enforce of access orders. Most provinces and territories provide that the information goes to the court. It has been pointed out that requiring that the information go to the court first "ensures that any abuse or domestic violence factors of which the person or public body is aware can be drawn to the court's attention and taken into consideration in determining whether information as to the child's location should be given to the applicant" (MacPhail, 1999: 16). British Columbia, Nova Scotia, Quebec and Saskatchewan have provisions that permit the information to go to the applicant rather than to the court. They should consider amending their provisions to provide that the information goes initially to the court. Alberta should enact a provision allowing an order for release of information to the court to facilitate access enforcement. The court may then give the information to such person or persons it considers appropriate.

3.4.3 Return of the Child

As indicated in Appendix A, with the exception of Alberta and Nova Scotia, all provinces and territories have enacted legislation specifically authorizing the courts to order the return home of a child who has been wrongfully removed to or retained in that province or territory, or when the court does not have jurisdiction. These statutory provisions may be applied in cases that are not governed by the Hague Convention on the Civil Aspects of International Child Abduction, including cases from within Canada. Alberta and Nova Scotia should consider enacting similar provisions. Quebec's legislation, by its terms, applies within Canada but is not currently in effect for cases involving other Canadian jurisdictions. Quebec should consider making it so.

The Hague Convention on the Civil Aspects of International Child Abduction came into force in Canada on December 1, 1983, and was extended to each of the provinces and territories as each enacted implementing legislation, as set out in Appendix A. Each province and territory (including Nunavut) has its own Central Authority. The Central Authority deals with abduction applications in the province or territory to which or from which a child has been abducted. As well, there is a federal Central Authority, who deals less directly with cases, and oversees and facilitates the operation of the Hague Convention, collects statistics for special commissions, and provides assistance as needed. The Convention applies to international abductions of children under the age of 16 between contracting states, when the abduction took place after the

Convention came into force in the relevant states.[139] The Convention does not apply to interprovincial abductions.

Article 12 provides that when a child has been "wrongfully" removed to or retained in a contracting state, an order will be made for return of the child to the country of his or her habitual residence, unless the application for return has been brought more than a year after the wrongful removal or retention and the child is now settled in his or her new environment. Further exceptions to the rule of automatic return are set out in articles 13 and 20.[140] Article 20 provides: "The return of the child under the provisions of Article 12 may be refused if this would not be permitted by the fundamental principles of the requested state relating to the protection of human rights and fundamental freedoms." Although the Convention protects rights of custody *and* access, it provides for return of the child only when there has been a "wrongful" removal or retention, and a removal or retention is "wrongful" only when it breaches "rights of custody."[141] Access rights are not given the same level of protection, and a parent who has only access rights may not use the Convention to obtain a return of the child who has been removed by the custodial parent.

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[139] The Convention is in force as of the indicated dates in the following states as a result of ratification, acceptance or approval: Argentina, June 1, 1991, Australia (Australian states and mainland territories only), January 1, 1987, Austria, October 1, 1988, Belgium, May 1, 1999, Bosnia and Herzegovina, December 1, 1991, China (Hong Kong Special Administrative Region only), September 1, 1997, China (Macau Special Administrative Region only), March 1, 1999, Croatia, December 1, 1991, Czech Republic, March 1, 1998, Denmark (except the Faroe Islands and Greenland) July 1, 1991, Finland, August 1, 1994; Former Yugoslav Republic of Macedonia, December 1, 1991, France, December 1, 1983, Germany, December 1, 1990, Greece, June 1, 1993, Ireland, October 1, 1991, Israel, December 1, 1991, Italy, May 1, 1995, Luxembourg, January 1, 1987, Netherlands (for the Kingdom in Europe), September 1, 1990, Norway, April 1, 1989, Portugal, December 1, 1983, Slovakia, February 1, 2001, Spain, September 1, 1987, Sweden, June 1, 1989, Switzerland, January 1, 1984, Turkey, August 1, 2000, United Kingdom of Great Britain and Northern Ireland, August 1, 1986, Isle of Man, September 1, 1991, Cayman Islands, August 1, 1998, Falkland Islands, June 1, 1998, Montserrat, March 1, 1999, Bermuda, March 1, 1999, United States of America, July 1, 1988, and Venezuela, January 1, 1997. In addition, the Convention is in force as of the dates indicated between Canada and the following states, whose accession to the Convention Canada has accepted: Bahamas, August 1, 1995, Belize, September 1, 1991, Burkina Faso, October 1, 1993, Chile, August 1, 1995 Columbia, December 1, 1997, Cyprus, January 1, 1998, Ecuador, December 1, 1993, Georgia, November 1, 1999, Honduras, August 1, 1995, Hungary, April 1, 1988, Iceland, December 1, 1997, Mauritius, August 1, 1995, Mexico July 1, 1992, Monaco, June 1, 1995, New Zealand, July 1, 1992, Panama, August 1, 1995, Poland, February 1, 1994, Romania, June 1, 1995, Saint Kitts and Nevis, August 1, 1995, Slovenia, August 1, 1995, South Africa, May 1, 1999, and Zimbabwe, January 1, 1998 (http://www.hcch.net/e/status/abdshte.html) as of December 14, 2000.

[140] Article 13 provides that a state is not bound to order the return of a child when: a) the person having the care of the child was not actually exercising the custody rights at the time of removal or retention, or had consented or subsequently acquiesced to the removal or retention or b) there is grave risk that the child's return would expose him or her to physical or psychological harm or otherwise place him or her in an intolerable situation. Article 13 also says that a court may refuse to order the return of a child, when it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of his or her views.

[141] Article 3 provides: "the removal or the retention of a child is to be considered wrongful where: (a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and (b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention."

Access rights are not defined in the Convention, but article 5(b) does say that "'rights of access' shall include the right to take a child for a limited period of time to a place other than the child's habitual residence." A parent who has only the right to visit and be visited by the child is not entitled to an order for return, but is entitled to assistance from the Central Authority under article 21, as follows:

> An application to make arrangements for organizing or securing the effective exercise of rights of access may be presented to the Central Authorities of the Contracting States in the same way as an application for the return of a child. The Central Authorities are bound by the obligations of co-operation, which are set forth in Article 7 to promote the peaceful enjoyment of access rights and the fulfilment of any conditions to which the exercise of those rights may be subject. The Central Authorities shall take steps to remove, as far as possible, all obstacles to the exercise of such rights. The Central Authorities, either directly or through intermediaries, may initiate or assist the institution of proceedings with a view to organizing or protecting these rights and securing respect for the conditions to which the exercise of these rights may be subject.

Because this provision does not impose any mandatory duties on the Central Authority to enforce access rights, only an obligation to promote co-operation, the Convention has not been an effective tool of access enforcement.[142] There are few reported cases on the access provision and relatively little attention has been given to it.[143] In a detailed 22-page manual prepared by the Canadian government for parents dealing with international child abduction, only one brief paragraph addresses the enforcement of access rights (Canada, 1998d:10).

The enforcement of rights of access under the Convention could be improved if Legal Aid were available for non-custodial parents trying to enforce their access rights in Canada. Governments should consider extending Legal Aid for such cases. Some provinces provide Legal Aid to foreign parents in access enforcement cases, depending on financial eligibility and the merits of the case.

In some cases, a non-custodial parent (or parent who does not live with the child) may be considered to have "rights of custody" and be entitled to have the child returned home. Article 5(a) of the Convention provides that "'rights of custody' shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence." When the non-custodial parent has more than the right to visit the child and shares the right to determine the child's place of residence, then he or she may have "rights of custody" within the meaning of the Convention and be entitled to an order for return of the child. The weight of international authority supports the view that removal of the child by the custodial parent in violation of an order, agreement or law violates the other parent's "rights of custody"

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[142] For discussion of the deficiencies of the access enforcement provisions of the Convention, see Lowe, 1994: 374; Todd, 1995: 558-559; Horstmeyer, 1995: 134-139.

[143] A rare example is *R.S.* v. *P.A.*, [1997] Q.J. No. 1610 (Super. Ct.), in which the father agreed it was in best interests of the child to stay in Canada with the mother but was not able to get a visa for Canada and claimed access in England. See also, *Irmya* v. *Narso*, [1996] O.J. No. 2501 (Prov. Div.): father applied under Convention for the child to be returned to the United States, but the parents then agreed to treat it as an application for access, and the father was awarded supervised access in Canada.

(Eekelaar: 1982, 309-10), and the courts in many countries have ruled to this effect (Silberman: 1994). In Canada, however, this issue has not been settled.

The first Convention case heard by the Supreme Court of Canada was *Thomson* v. *Thomson*.[144] In that case, a mother with interim custody brought the child to Canada in violation of the interim custody order, which said that the child was not to be taken from Scotland. On the issue of whether the removal or retention was wrongful, the Supreme Court of Canada ruled that it had been because the non-removal clause of the mother's interim custody order preserved the jurisdiction of the Scottish court to determine the issue of custody on the merits in a full hearing. Therefore, the Scottish court became an institution with "rights of custody" immediately before the removal of the boy, and the mother's breach of those custody rights constituted a wrongful removal within the meaning of the Convention. The mother's removal did not breach the custody rights of the father, who had only an interim access order, but it did breach the custody rights of the court.

The Court was careful to limit its decision on the wrongful removal issue to cases of interim custody, and suggested that a final custody order with a non-removal clause would not give rise to rights of custody of the court or the non-custodial parent. In a subsequent decision, the Court suggested in *obiter dicta* that a non-removal clause in a final order would not give a non-custodial parent rights of custody under the Convention.[145] There remains uncertainty about this in Canada. The central authorities of Ontario and British Columbia indicated that they treat non-removal clauses in final orders as creating rights of custody under the Convention and leave it for the courts to determine otherwise.[146] This is consistent with the reported practice of central authorities of most parties to the Convention, according to which central authorities reject applications only when they manifestly fall outside the scope of the Convention, for instance when the age requirement is not met. Any doubt about the rights of custody or the habitual residence of the child is left for the court to dispel (Hague Conference, 1997).

In *Thorne* v. *Dryden-Hall*, the British Columbia Court of Appeal ruled that two children were wrongfully taken from England by their mother, who had been granted a residence order by the English court. The father had been granted a contact order and, under English law, retained parental responsibility. Under English law the mother could not remove the children from the country without the consent of the father or leave of the court. The mother's residence order was not an interim order, as in the *Thomson* case, but the B.C. Court of Appeal ruled that the mother's removal of the children violated the rights of custody of the English court.[147] This case may be distinguished from a case involving a non-custodial parent with a final order and a non-removal clause or law because here the father had continuing parental responsibility. In the author's view, such a distinction is invalid (Bailey, 1996), but it is not yet clear whether this view will be accepted in Canada.

In *E.M.M.* v. *G.A.M.*, the parents had agreed to joint legal custody with the mother having physical custody and responsibility for day-to-day care. The parents agreed to consult one

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144 *Thomson* v. *Thomson*, [1994] 6 R.F.L. (4th) (S.C.C.).

145 *V.W.* v. *D.S.*, [1996] 134 D.L.R. (4th) 481 (S.C.C.) at 504.

146 Telephone communications with Michelle Potruff, Central Authority for Ontario, February 22, 2000, and Allison Burnet, Central Authority for British Columbia, February 23, 2000.

147 *Thorne* v. *Dryden-Hall*, [1997] B.C.J. No. 1243 (C.A.).

another on issues related to the children's health, education and welfare, and to notify the other of a change of address. The mother removed the children from New York to Manitoba without consulting with or notifying the father. The court ruled that the mother's removal of the children violated the father's rights of custody under the Convention. "The right to determine residence" is a concept divisible from "physical custody" or "the right to care of the person," whether under the Convention or New York law. "Joint legal custody" under New York law does create a "right of custody" within the meaning of the Hague Convention and includes the right to determine residence.[148]

Again, the question of whether a non-residential parent with joint legal custody should be in a position that is different from that of a non-custodial parent with a final non-removal order needs to be answered in Canada.

Central authorities should continue to treat non-removal orders, agreements and laws as giving rise to rights of custody and leave it for the courts to determine otherwise. It is hoped that courts in Canada will clarify this issue and extend to non-custodial parents with non-removal orders the same right of return that is given by other parties to the Convention.

3.4.4 Punitive Measures

The *Criminal Code* provisions on parental child abduction may apply to both domestic and international cases. Custodial parents may be subject to punishment for parental child abduction under the *Criminal Code*.[149]

> 283. (1) Every one who, being the parent, guardian or person having the lawful care or charge of a person under the age of fourteen years, takes, entices away, conceals, detains, receives or harbours that person, in relation to whom no custody order has been made by a court anywhere in Canada, with intent to deprive a parent or guardian, or any other person who has the lawful care or charge of that person, of the possession of that person, is guilty of (a) an indictable offence and is liable to imprisonment for a term not exceeding ten years; or (b) an offence punishable on summary conviction.

The provisions are aimed at violations of rights of custody rather than rights of access, but have been applied to enforce access in limited circumstances. In *R.* v. *Petropoulos*,[150] the mother had access for three days each week and the custodial father was found guilty of parental child abduction when he took the child from British Columbia to Ontario. The court reasoned that the mother's access was so extensive as to amount to joint custody, which triggered the *Criminal Code* abduction provision.

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[148] *E.M.M.* v. *G.A.M.*, [1999] M.J. No. 566 (Q.B. (Fam. Div.)) at para. 21.

[149] Section 282 of the *Criminal Code*, R.S.C. 1985, c. C-46, says that every one who, being the parent, guardian or person having the lawful care or charge of a person under the age of fourteen years, takes, entices away, conceals, detains, receives or harbours that person, in contravention of the custody provisions of a custody order in relation to that person made by a court anywhere in Canada, with intent to deprive a parent or guardian, or any other person who has the lawful care or charge of that person, of the possession of that person is guilty of a) an indictable offence and is liable to imprisonment for a term not exceeding ten years or b) an offence punishable on summary conviction.

[150] *R.* v. *Petropoulos* (1990), 59 C.C.C. (3d) 393 (B.C.C.A.).

More recently, in *R.* v. *Dawson*,[151] the Supreme Court of Canada addressed the issue of whether a *de facto* custodial father could be guilty of "taking" his child with intent to deprive the access mother of possession of the child under section 283 of the *Criminal Code*, when the mother never had physical possession of the child because the father removed the child from Canada prior to a court-ordered access visit. The trial judge acquitted the father, reasoning that the father could not be guilty of taking the child because at all material times the child had been legally in the care of the father. The Court of Appeal for Nova Scotia overturned the acquittal and ordered a new trial. The Supreme Court of Canada, in a 5:2 decision, dismissed the father's appeal.

The majority of the Supreme Court of Canada did not discuss the policy question of whether criminal sanctions are an appropriate measure to use for access enforcement. In her dissenting opinion, McLachlin J. discussed whether the criminal law *should* be applied to enforce rights of access. Penal sanctions offer one means of deterring custodial parents from frustrating access by abducting the child. McLachlin J. argued against criminalizing interference with access rights, as opposed to custody rights, and stated that civil sanctions were a more appropriate remedy. MacPhail discusses the situations in which criminal charges for abduction may help, but her discussion focusses on abduction by the non-custodial parent (MacPhail, 1999: 1-9). The circumstances in which criminal abduction charges against the custodial parent are available and appropriate for the enforcement of access rights should be further considered and clarified.

3.5 Enforcement of Foreign Access Orders

At common law, it is not possible to enforce a foreign custody or access order, not even an order made in another Canadian jurisdiction.[152] A court will consider such an order only as one factor to be considered in a proceeding to determine custody or access. However, statutes that recognize and allow enforcement of foreign access orders have superseded the common law. This is important because such statutes address the problem of non-custodial parents being forced to obtain a new order for access in the jurisdiction to which the custodial parent has moved before proceeding with enforcement. It is necessary for the non-custodial parent to apply to have the order recognized and enforced, but not to re-apply for access. Although the recognizing court may vary or supersede the access in accordance with the statutes of each province and territory, the court's starting point will be the existence of an enforceable access order in favour of the non-custodial parent. The measures to enforce foreign access orders will not exceed those available to enforce domestic orders.

As indicated in Appendix A, an access order made under the federal *Divorce Act* has legal effect throughout Canada and may be enforced throughout Canada. Access orders that are not made under the *Divorce Act* are recognized and enforceable only as provided in provincial and territorial legislation.

Alberta and Manitoba have enacted the necessary legislation to recognize and enforce foreign access orders, under which a court shall enforce an access order as if the order had been made by the court, unless it is satisfied the child did not at the time the order was made have a real and substantial connection with the granting jurisdiction.

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[151] *R.* v. *Dawson*, [1996] 3 S.C.R. 783.

[152] *McKee* v. *McKee*, [1951] A.C. 352 (P.C.).

New Brunswick, Newfoundland, the Northwest Territories, Nunavut, Ontario, Prince Edward Island and Yukon have enacted the necessary legislation to recognize and enforce foreign access orders, under which a court must recognize and enforce a foreign access order as an order of the court unless, in the proceedings in which the order was granted, the respondent was not given notice or an opportunity to be heard, the best interests of the child standard did not govern, the order is contrary to the public policy of the province or territory, or the court acted without jurisdiction.

Saskatchewan's legislation provides that a court shall enforce an order that provides for access "at specific times or on specific dates" as if it had been made by the court, but may refuse to enforce the order and may make any other order for access that it considers necessary if the child is in Saskatchewan and the court is satisfied on the balance of probabilities that the child would suffer serious harm if subject to access by the person entitled to it, or is satisfied that the court that granted the access order did not have jurisdiction in accordance with Saskatchewan law. Although Saskatchewan's law provides for unilateral enforcement only in the case of specific access orders, this is not problematic because enforcement actions require a specific order in any case.

In contrast with the legislation of other provinces and territories that recognizes and allows unilateral enforcement of foreign access orders, Nova Scotia law allows enforcement of access orders made by reciprocating jurisdictions.[153] As well, Nova Scotia law allows enforcement of access orders made by superior courts in other Canadian jurisdictions that have been registered with the Nova Scotia Supreme Court.[154] Thus, access orders granted by jurisdictions that have not been declared reciprocating, or by superior courts of other Canadian jurisdictions, will not be recognized and enforced but may be considered by the court. Nova Scotia should consider amending its statute to provide for unilateral recognition of foreign and extraprovincial custody and access orders.

3.6 Enforcement Against the Non-custodial Parent

Failure to exercise access arises in cases dealing with custody applications,[155] applications to rescind access[156] or applications for support or some form of compensation for expenses related to failure to exercise access.[157] As well, failure to exercise access is an issue in relocation cases, because a non-custodial parent seeking to prevent the custodial parent from moving with the child must have an ongoing relationship with the child in order to satisfy the threshold test of a "material change in circumstances."[158] In addition, there are many cases in which the custodial

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[153] *Reciprocal Enforcement of Custody Orders Enforcement Act*, R.S.N.S. 1989, c. 387, s. 3. The reciprocating jurisdictions are Alberta, British Columbia, Manitoba, New Brunswick, Newfoundland, Prince Edward Island, Ontario and Saskatchewan (N.S. Regs. 13/77, 102/77, 104/79, 145/79, 225/82).

[154] *Family Maintenance Act*, R.S.N.S. 1989, c. 160, s. 43 (2).

[155] *H.A.* v. *D.M.*, [1995] O.J. No. 4021 (Q.L.) (Ct. Justice (Prov. Div.): father who had failed to exercise access sought custody but was granted access.

[156] *Vandebyl* v. *Belko*, [1992] O.J. No. 3091 (Q.L.) (Ct. Justice (Prov. Div.)).

[157] *Mackinnon* v. *MacKinnon*, [1988] N.S.J. No. 517 (Q.L.) (N.S. Fam. Ct.) at paras. 35 and 36.

[158] *Gordon* v. *Goertz*, [1996] 2 S.C.R. 27 at para. 14. Failure to exercise access may also be an issue in international abduction cases, in which there is the question of whether or not a parent was exercising "rights of custody" at the time of the abduction or had "acquiesced" to removal of the child.

parent has supported access and actively encouraged more access.[159] Even in cases of domestic violence, the custodial mother has supported or agreed to access, often with supervision to safeguard the child.[160]

It is important to examine the circumstances that lead to failure to exercise access in order to develop effective approaches to this problem. Failure to exercise access may follow from denial or discouragement on the part of the custodial parent. For example, in *Dombroski* v. *Dombroski*, the father stopped exercising access because the custodial mother unreasonably required that all access visits take place at her residence.[161] In *McNair* v. *Tetrault*, the mother failed to fully exercise her interim access rights but this was not held against her in the custody determination because the father was at fault for failing to facilitate the access visits—when the father stopped providing transportation for the access visits, the mother was unable to exercise access without substantial difficulty.[162]

Some non-custodial parents, on their own initiative, exercise access inconsistently or gradually withdraw or simply disappear from their children's lives, often causing pain and disappointment to their children.[163] In some of these cases, the non-custodial parent's interest in access is reinvigorated when the opportunity to exercise access is threatened.[164] Very often a failure to exercise access coincides with failure to pay child support, and the interest in access is sometimes revived when child supports orders are enforced.[165] The explanations given by non-custodial parents for their disengagement are varied, and sometimes unconvincing. For example, in *Martin* v *Matruglio*, the court said the following:

> It was common ground at the trial that the wife was anxious for the husband to have more contact than he was having with the children but that the husband took the view that he was unable to do so, firstly, because of restrictions placed upon him by the nature of his employment, and secondly, because he did not want to spend all of his spare time with his children at the expense of his relationship with his second wife.[166]

Some non-custodial parents pursue the right to custody or access but in the meantime fail to exercise access regularly, apparently because the terms of access or the current custody

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[159] See, for example, *A.B.* v. *N.R.*, [1998] Q.J. No. 3904 (Super. Ct. (Fam. Div.)).

[160] See, for example, *Matheson* v. *Sabourin*, [1994] O.J. No. 991 (Ct. Justice (Prov. Div.)).

[161] *Dombroski* v. *Dombroski*, [1993] A.J. No. 243 (Q.L.) (Q.B.).

[162] *McNair* v. *Tetrault*, [1995] O.J. No. 3044 (Q.L.) (Ct. Justice (Prov. Div.)).

[163] *Vandebyl* v. *Belko*, [1992] O.J. No. 3091 (Q.L.) (Ct. Justice (Prov. Div.)): father failed to "maintain even a modicum of contact"; *Isfeld* v. *Daniels* (1995), 103 Man. R. (2d) 312 (Q.B.): father failed to exercise access or make any inquiry about children for three years; *Butson* v. *LaCombe* (1984), 41 R.F.L. (2d) 222 (Ont. U.F.C.): father's persistent failure to exercise access hurt the child; *Surette* v. *Thomas* (1996), 13 O.T.C. 219 (Gen. Div.): father had become stranger and had "allowed that attachment to wither away".

[164] See, for example, *Martin & Matruglio* [1999] Fam. C.A. 1785 (December 23, 1999) (Full Court of the Family Court of Australia): father who had failed to exercise access fully tried to stop mother from relocating within Australia; *Lund* v. *Gabe*, [1995] B.C.J. No. 1903 (S.C.): father exercised access inconsistently but did not want mother to move away.

[165] See, for example, *A.B.* v. *N.R.*, [1998] Q.J. No. 3904 (Super. Ct. (Fam. Div.)).

[166] *Martin & Matruglio*, at para. 78.

arrangement is not acceptable.[167] In *H.A.* v. *D.M.*, for example, the father blamed his failure to exercise access on the travel distance and the custodial parent, but the court stated that the father himself was to blame for maintaining a distance from the child "if he could not be assured of success in his pursuit of custody."[168] In *MacLeod* v. *MacLeod*, the father, who did not effectively exercise his access rights after separation, was seeking custody. The trial judge said that there were some valid reasons for his failure (the custodial mother moved with the child and access was diminished as a result of the cost of travel and the increased difficulty of communication), but that the failure to exercise access was also partly due to the father's "stubbornness" or "injured feelings."[169]

In some cases, non-custodial parents, usually fathers, who are angry, hostile, violent and often substance-abusing, fail to exercise access but pursue their access rights or other claims in court to harass or control the custodial mother.[170] For example, in *Chan* v. *Spencer*, the father was described by the judge as an angry, hostile individual who presented himself in a threatening and intimidating manner. The court commented that the father did not show any real interest in pursuing his claim for custody or access, that he failed to exercise access as ordered, and that his "greater interest appeared to be to harass Ms. Chan and impede the timely hearing of this action."[171]

3.6.1 Persuasive Measures

The child's right of access is undermined by failure of some non-custodial parents to exercise access. The disengagement of non-custodial parents, usually fathers, is a serious concern because of the negative impact of this withdrawal on the children. Researchers have found that a continuing positive relationship with both parents is one factor associated with positive outcomes for children following parental separation (Wallerstein & Kelly, 1980), although later studies indicate that absence of conflict and a well-functioning custodial parent are more important factors (Furstenberg & Cherlin, 1991). Mothers are encouraged and disciplined to facilitate paternal access, just as fathers are both encouraged and disciplined to honour their child support obligations. With regard to access, however, the law's treatment of the non-custodial parent, usually the father, is encouraging but not disciplinary. The operating presumption is that the law could not force a parent to maintain nurturing contact with his or her child and that any effort to do so would be misguided.

Whether more vigorous attempts to enforce the duty to exercise access should be made is questionable. Most commentators agree with Maccoby and Mnookin, who wrote as follows:

> Should the law be used to create a legal obligation on the part of a non-custodial parent to stay in contact with the children? Although some commentators have argued for such a

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[167] *Evin* v. *Evin*, [1997] B.C.J. No. 2201 (S.C.): non-custodial father sought sole or joint custody and stated that if the mother retained sole custody he would stop seeing the child.

[168] *H.A.* v. *D.M.*, [1995] O.J. No. 4021 (Q.L.) (Ct. Justice (Prov. Div.).

[169] *MacLeod* v. *MacLeod*, [1996] N.S.J. No. 578 (Q.L.) (N.S.S.C.). See also, *C.A.R.* v. *L.G.*, [1998] Q.J. No. 1987 (Sup. Ct. Fam. Div.): non-custodial mother refused to see her son but sought custody.

[170] *Koch* v. *Mitchell*, [1999] B.C.J. No. 52 (B.C.C.A.).

[171] *Chan* v. *Spencer*, [1998] B.C.J. No. 1317 (B.C.S.C.). See also *Rheaume* v. *Leclair*, [1993] O.J. No. 2380 (Q.L.) (Ct. Justice (Prov. Div.)).

> legal obligation, we are very sceptical... [and] we doubt whether law can effectively sustain a relationship when the parent himself is not motivated to do so (Maccoby & Mnookin, 1992: 288).

It is unlikely that fines, imprisonment or coercion would cause the non-custodial parent to adopt positive parenting behaviour. Different solutions are necessary that take into account the research on the reasons behind disengagement of non-custodial parents.

The futility of trying to force a positive access relationship on an unwilling non-custodial parent is one reason for the current emphasis on preventive and alternative approaches to access and access enforcement disputes. Introducing parental education programs at the outset of all contested custody or access disputes would probably help efforts to persuade non-custodial parents to exercise access consistent with the best interests of the child. It is probable that even earlier parental education programs are needed in order to foster long-term positive parent-child relationships that can survive parental separation. It does not seem likely that forcing non-custodial parents who have already disengaged from their children to attend such programs will lead to significant improvements, but additional research on this issue is needed.

As noted in Appendix A, no province or territory has enacted legislation that expressly encourages non-custodial parents to maintain contact with their children, although legislative remedies for non-exercise of access may be viewed as indirect attempts to do so. Parental education programs typically address this issue and are available in some parts of the country; however, no jurisdiction has assumed responsibility for providing such programs or other measures to encourage ongoing contact.

3.6.2 Defining Wrongful Failure to Exercise Access

As noted in Appendix A, Alberta, Manitoba, Newfoundland and Saskatchewan have enacted remedies for failure to exercise access. Ontario has done so as well but its provision has never been proclaimed. Most of these jurisdictions make remedies available when the non-custodial parent fails to exercise access without giving reasonable notice or without reasonable notice and excuse. Manitoba, however, provides remedies for "wrongful" failure to exercise access without defining the term. This province should amend its statute to clarify that remedies are available when the failure to exercise access was without reasonable notice and excuse.

3.6.3 Remedies for Failure to Exercise Access

As noted in Appendix A, Alberta, Manitoba and Newfoundland provide that a court may order the non-custodial parent to reimburse the custodial parent for any reasonable expenses actually incurred as a result of failure to exercise access. Ontario has made similar provision but never proclaimed its provision. All provinces and territories should provide that courts may order the non-custodial parent to pay compensation to custodial parents for expenses incurred as a result of wrongful failure to exercise access. Compensation would reduce the unfair treatment of the custodial parent, who must, for example, incur babysitting costs or forego opportunities to earn income because of the access parent's conduct.

There is no provision for compensation in Nova Scotia; however, the province does allow judges to award additional child support to compensate for failure to exercise access. One judge reasoned as follows:

> The failure to regularly exercise access means the custodial parent provides for/to the child(ren) virtually all meals, recreation, transportation, entertainment, special occasions, holidays, and educational and emotional support. In addition, the custodial parent lacks any "break"—any personal interests or demands, be they employment, dating, recreational, educational, can be pursued only after the children's needs are addressed and looked after.
>
> I see no reason not to consider the failure to exercise access in circumstances where, as here, it is available, encouraged, and sought, as a factor in the assessment of child maintenance.[172]

As noted in Appendix A, Newfoundland and Saskatchewan provide that courts may order mediation in cases of failure to exercise access. Ontario has also provided such an order but its provision is not in force. As noted above, there is widespread agreement that mediation should be voluntary. Therefore, provisions allowing courts to order involuntary mediation are problematic, and those allowing courts to order mediation when the parties agree are unnecessary. The provinces should repeal provisions for court-ordered mediation.

As noted in Appendix A, Manitoba and Saskatchewan provide that courts may order supervised access in cases of failure to exercise access. Ontario has done this also, but its provision is not in force. Saskatchewan's law also provides that the court may order the non-custodial parent to give security for performance of the obligation or provide his or her address and telephone number. Other provinces and territories should consider enacting such provisions.

Non-custodial parents who do not comply with the access order may be liable for punishment for contempt. In practice, contempt proceedings against the non-custodial parent usually relate to failure of the parent to return the child on time or to other types of non-compliance with the terms of access.[173]

Cases involving attempts to force a non-custodial parent to exercise access are very unusual. When 11-year-old twin boys tried unsuccessfully to "sue" their father to force him to spend time with them or pay a penalty, their effort was reported as a rarity (Schmitz, 1996: 1).

3.7 Responsibility for Access Enforcement

Although governments are involved in access enforcement, as outlined above, and provide some services relating to access disputes, the enforcement of access orders is largely the responsibility of individual parents. Except in the case of criminal proceedings, individual parents must retain their own lawyers and initiate enforcement proceedings, which do not often yield positive

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[172] *Mackinnon* v. *MacKinnon*, [1988] N.S.J. No. 517 (N.S. Fam. Ct.) at paras. 35 and 36.

[173] *S.E.H.* v. *S.R.M.* [2000] B.C.J. No. 786 (S.C.): the non-custodial father was fined $2,000 for failure to comply with the terms of access but contempt could be purged by completion of a parental education program and counselling.

results. In general, preliminary evaluation and screening of custody and access disputes are not widely available; when an assessment is needed, parents must seek an agreement or order for the assessment and must often arrange and pay for it themselves, or do without. When they are not lucky enough to live in an area where mediation and supervised access services are provided, they often must do without or arrange and pay for mediation and organize supervision of access themselves.

As indicated in Appendix A, no province or territory currently provides for a government agency to enforce access orders. The central question for governments in Canada is whether or not they are willing to take on the responsibility of enforcing access orders as they have for enforcing support orders and, in some cases, custody orders.[174] Perhaps more important is the question of whether or not governments are willing to mandate that important services such as evaluation, parental education, mediation and supervised access be provided, rather than continue with a system in which services may or may not be provided and many areas are without services. While most provinces and territories provide services, such as parental education, mediation, supervised access and evaluation, to people with custody and access issues, these services are not necessarily focused specifically on the enforcement of access orders. As well, in some provinces and territories, civil Legal Aid may be available to parents to enforce access orders, depending on the merits of the case and financial eligibility.

Provinces and territories could each establish a court-connected office with responsibility for providing these services and for enforcing access orders when preventive and alternative measures fail. A model for such an office is Michigan's Friend of the Court program, discussed in the next part of this report, which is mandated to provide all these services and to enforce support and parenting time (access) orders.

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[174] See, for example, *Family Responsibility and Support Arrears Enforcement Act*, 1996, S.O. 1996, c. 31: Ontario eliminated the statutory responsibility for enforcing custody orders and the Director of the Family Responsibility Office is now responsible for enforcing only support orders, although section 6(5), which says that "the Director shall not enforce custody orders made by a Canadian court, even if they were filed with the Director before this section comes into force" has not yet been proclaimed; *Maintenance and Custody Orders Enforcement Act*, R.S.Y. 1986, c. 108: Yukon's Director of Maintenance and Custody Enforcement is responsible for enforcing support and custody orders.

4.0 FOREIGN LEGAL MODELS AND COURT-BASED PROGRAMS

This section discusses what lessons can be drawn from the experiences of other jurisdictions that would be helpful in developing Canadian programs and legislation in the area of access.

4.1 United States

The United States has not ratified the UN Convention on the Rights of the Child, and constitutionally protected parental rights limit the ability of states to refuse, restrict or terminate access. In *Santosky* v. *Kramer*, the U.S. Supreme Court held that constitutional due process requires that a "clear and convincing" evidence standard be applied in an action to terminate parental rights on the basis that the child has been "permanently neglected,"[175] and the same requirement has been applied in private law cases. In *Mullin* v. *Phelps*, for example, the Vermont Supreme Court held that although proof of sexual abuse could lead to a change in custody, it could not result in a complete denial of access unless the standard of proof required in a parental termination case was met—that is, unless the sexual abuse was proved by "clear and convincing" evidence.[176] The Louisiana Supreme Court reached the same conclusion and declared unconstitutional a statute that required a court, upon a finding that a parent had sexually abused his or her child, to terminate access. The court did so because the statute did not expressly require a standard of proof greater than a preponderance of the evidence as a basis for mandatory termination of an allegedly abusive parent's access rights.[177] The Court concluded that failure to require proof of sexual abuse of the child by the parent by clear and convincing evidence rendered it unconstitutional because it violated the parent's procedural due process rights. "Until the state proves sexual abuse in a fact-finding hearing that provides procedural due process, the parent and the child presumably have a shared interest in preventing the erroneous destruction of the family relationship."[178]

Several American states have adopted the *Uniform Marriage and Divorce Act* provision, which states that "a parent not granted custody of the child is entitled to reasonable visitation rights unless the court finds, after a hearing, that visitation would endanger seriously the child's physical, mental, moral, or emotional health."[179] The express purpose of this provision is to modify the best interests of the child rule by placing a stricter burden on the court and on the custodial parent seeking to curtail access, and to prevent courts from denying access on the basis of "irrelevant moral judgments" about the parent's behaviour.[180] Even in states that have a statutory best interests of the child test for determining access, courts have refused to deny

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[175] *Santosky* v. *Kramer*, 455 U.S. 745 (1982).

[176] *Mullin* v. *Phelps*, 647 A.2d 714 (Vt. 1994).

[177] *In re A.C.*, 643 So.2d 743 (La. 1994).

[178] *Ibid.* at 748.

[179] *Uniform Marriage and Divorce Act*, section 407, 9A U.L.A. 612 (1987). This provision has been adopted verbatim in Illinois, Kansas, Kentucky and Montana: Ill. Rev. Stat. ch. 750, para. 5/607(a); Kan. Stat. Ann. s 60_1616(a) (1994); Ky. Rev. Stat. Ann. s 403.320(1) (1994); Mont. Code Ann. s 40_4_217 (1993). Arizona's provision is similar: Ariz. Rev. Stat. Ann. s 25_337 (1991) provides that a non-custodial parent is entitled to reasonable access, unless the court finds "serious endangerment" to the child's health. Missouri does not permit limits on access, unless there is a threat to the child's "physical health or emotional development": Mo. Ann. Stat. s 452.400.

[180] *Uniform Divorce and Marriage Act*, *ibid.* at 612_13.

parental access absent evidence of harm to the child.[181] The strong presumption in favour of access unless it is clearly proven that it would put the child at risk of harm is inconsistent with the UN Convention on the Rights of the Child requirement that access be determined according to the best interests of the child.

Michigan, which has given substantial attention to the issues of access (called "parenting time") and access enforcement, has adopted a strong presumption that it is in the best interests of the child to have a strong relationship with both parents. Its *Child Custody Act* provides that the child has a right to access unless it is proven by "clear and convincing evidence" that it would endanger the child's physical, mental or emotional health.[182] The specific factors to be considered when determining custody and access are set out below. Of particular interest are the specific provisions related to violence and abuse that Michigan has incorporated into its *Child Custody Act*.

First, access to a child conceived as a result of criminal sexual conduct may not be awarded to the convicted parent. The prohibition does not apply when, after the conviction, the parents cohabit and care for the child together, or when the conviction was based solely on the victim being between 13 and 16 years old.[183] Also, a parent convicted of criminal sexual conduct with his or her own child may not be granted access to the child or a sibling unless the other parent and the child or sibling consent.[184] In almost all other cases, access will be ordered.

Michigan's *Child Custody Act* sets out a list of factors to be considered when determining which custody and access orders are in the best interests of the child:

a) The love, affective, and other emotional ties existing between the parties involved and the child.
b) The capacity and disposition of the parties involved to give the child love, affection, and guidance and to continue the education and raising of the child to his or her religion or creed, if any.
c) The capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs.
d) The length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity.
e) The permanence, as a family unit, of the existing or proposed custodial home or homes.
f) The moral fitness of the parties involved.
g) The mental and physical health of the parties involved.
h) The home, school, and community record of the child.
i) The reasonable preference of the child, if the court considers the child to be of sufficient age to express preference.

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[181] See, for example, *Parker* v. *Ford*, 453 N.Y.S.2d 465 (App. Div. 1982) at 466, which the court said that "visitation is always to be premised upon a consideration of the best interests of the children... however, denying visitation to a natural parent is a drastic remedy and should only be done where there are compelling reasons... and there must be substantial evidence that such visitation is detrimental to the children's welfare."

[182] *Child Custody Act*, MCLA 722.27a(3); MSA 25.312(7a)[3].

[183] *Child Custody Act*, MCLA 722.27a(4); MSA 25.312(7a)[4].

[184] *Child Custody Act*, MCLA 722.27a(5); MSA 25.312(7a)[5].

j) The willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent or the child and the parents.
k) Domestic violence, regardless of whether the violence was directed against or witnessed by the child.
l) Any other factor considered by the court to be relevant to a particular child custody dispute.[185]

The child's opinion is listed as one factor to consider when determining the best interest of the child,[186] and children of sufficient age to express preference have a statutory right to express their views during the investigation that is conducted into every disputed custody and access case.[187] However, the child s opinion is not accorded strong weight, even when the child is mature and capable, if it would result in access being cut off.[188]

Michigan's statute also says that the court may consider the following factors when deciding the frequency, duration and type of parenting time (access):

a) The existence of any special circumstances or needs of the child.
b) Whether the child is a nursing child less than 6 months of age, or less than 1 year of age if the child receives substantial nutrition through nursing.
c) The reasonable likelihood of abuse or neglect of the child during parenting time.
d) The reasonable likelihood of abuse of a parent resulting from the exercise of parenting time.
e) The inconvenience to, and burdensome impact or effect on, the child of travelling for purposes of parenting time.
f) Whether a parent can reasonably be expected to exercise parenting time in accordance with the court order.
g) Whether a parent has frequently failed to exercise reasonable parenting time.
h) The threatened or actual detention of the child with the intent to retain or conceal the child from the other parent or from a third person who has legal custody. A custodial parent's temporary residence with the child in a domestic violence shelter shall not be construed as evidence of the custodial parent's intent to retain or conceal the child from the other parent.
i) Any other relevant factors.[189]

The likelihood of abuse of the child or a parent is a factor to be considered when determining the frequency, duration and type of access (factors c) and d)). Supervised access may be ordered to protect the child from parental violence (Michigan, 2000a: 4-14). However, there are not enough supervised access facilities in Michigan, raising questions about whether or not children are adequately protected.[190]

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[185] *Child Custody Act*, MCLA 722.23.
[186] *Child Custody Act*, MCLA 722.23 (i).
[187] *Child Custody Act*, MCLA 722.24.
[188] *Casbergue* v. *Casbergue*, 124 Mich. App. 491, 335 NW2d 16 (1983).
[189] *Child Custody Act*, MCLA 722.27a (6) (7); MSA 25.312(7a) [6], [7].
[190] There was general agreement among those interviewed on April 13, 2000 at Michigan's Friend of the Court Bureau and at the Ingham County Friend of the Court office that there are not enough supervised access services in the state.

Across the U.S., non-custodial parents may be subject to restrictions on their access to protect the child. In all jurisdictions, supervised access is commonly ordered when there has been sexual or other physical abuse (Tortorella, 1996: 9). It may also be ordered when the non-custodial parent has no existing relationship with the child, lacks parenting skills, suffers mental illness, abuses substances, presents a risk of abduction or has been violent, or when the custodial parent has denied access (Strauss, 1995: 229; Pearson & Thoennes, 2000: 124).

Preventive and alternative measures have been adopted across the U.S. with varying degrees of success. In 1998, Geasler and Blaisure surveyed parental education programs across the country and found that "the popularity and complexity of programs for divorcing parents continues to grow" but only a small percentage have conducted any type of evaluation (Geasler & Blaisure, 1999: 56, 60). Michigan's Friend of the Court, as outlined below, offers various alternative and preventive programs, including parental education.

Michigan's Friend of the Court is a statutorily created agency employed by the circuit court of each judicial circuit (there are 57 circuits).[191] Created in 1919 to enforce child support in divorce cases on behalf of children who "may become public charges," the Friend of the Court program expanded its functions over the 20th century (Michigan, 2000b: 2). The Friend of the Court program helps collect, disburse, enforce and modify child support, and now is also the investigative and enforcement entity of the circuit court for custody and parenting time (access). As well, the program is required by statute to provide mediation. It also provides ongoing case management for domestic relations actions and helps parents with their proceedings (Michigan, 2000b: 3).

Michigan has been relatively successful in enforcing child support orders. John Ferry, State Court Administrator, attributed Michigan's success to three factors:

- the Friend of the Court offices are based locally so they can respond to local conditions;
- the Friend of the Court is an extension of the Surrogate Court and has the power of the court behind it; and
- the Friend of the Court enforces parenting time orders as well as support orders (other state agencies enforce support orders only).[192]

The Friend of the Court program generates a large number of complaints.[193] Ferry attributed these complaints to misunderstandings of what the Friend of the Court can do or has done and to legitimate concerns about the treatment people received from staff. Ferry noted that Friend of the Court clients are not a happy group because they are dealing with very emotional issues and are, therefore, hard to deal with themselves. He acknowledged that there is a need for more staff and for better training, and that there is a high turnover among Friend of the Court staff because

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[191] *Friend of the Court Act*, MI Statutes, Ch. 552.

[192] John D. Ferry, State Court Administrator, presentation to the Michigan Congressional Family and Civil Law Workgroup on Friend of the Court Projects. April 13, 2000.

[193] In 1999, the Friend of the Court had a total caseload of 839,049, and there were 262,993 complaints about support and 132,613 complaints about custody or parenting time (Michigan, 2000b: Appendix C).

it is a highly stressful job.[194] The Friend of the Court has inadequate resources, and in 1999 there was an average caseload of 459 per staff member (Michigan, 2000b: Appendix C).[195]

Although the statutes and rules governing the Friend of the Court program operate across the state, the offices in the various circuits operate substantially differently (Bassett et al., 1998: 11-47). Each office must develop its own handbook to distribute to parties. The Friend of the Court Bureau at the State Court Administration Office develops a model handbook (Michigan, 1998a), which the offices then modify to reflect local practices. The Oakland County Friend of the Court office has been identified as particularly successful, and its handbook provides a practical and thorough introduction to the divorce process (Oakland, a). Attached as Appendix B to this report is an excerpt from this handbook dealing with parenting time.

The Oakland Country office developed a parental education program called Start Making it Liveable for Everyone (SMILE) about 10 years ago. SMILE is an award-winning program that has been adopted by many other Michigan county Friend of the Court offices and other states.[196] Written material and a SMILE videotape are available (Oakland County, b).[197] The Oakland County Friend of the Court office is currently developing SMILE 2, a refresher parental education course for post-divorce families, which will cover issues that arise as children get older. This initiative responds to the consensus opinion of experts that "divorce is understood most appropriately as a *process that unfolds over time* rather than a single isolated event in a family's history" (Freeman, 1998: 85).

Two years ago, the Oakland County Friend of the Court office developed a parental education program for unmarried fathers who have never lived with or lived only briefly with the custodial mother. This program, called Forget Me Not, is aimed at educating unmarried fathers about the importance of developing and maintaining a positive relationship with their children, taking into account the fact that this client group may not have the same initial commitment to family as do those who marry, and is more likely to "disappear."[198]

The Friend of the Court program emphasizes early preventive interventions. John Ferry told the Michigan members of Congress that Friend of the Court offices have made increasing use of

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[194] John D. Ferry, State Court Administrator, presentation to the Michigan Congressional Family and Civil Law Workgroup on Friend of the Court Projects. April 13, 2000.

[195] Resource problems were mentioned by everyone interviewed who was involved in the Friend of the Court program, and stressed by John D. Ferry, State Court Administrator, in his presentation to the Michigan Congressional Family and Civil Law Workgroup on Friend of the Court Projects on April 13, 2000. Ferry explained that six years ago, Michigan obtained a five-year waiver so that it could use federal funds transferred to the states for custody and parenting time enforcement. At the end of the waiver period, the federal government refused to continue funding custody and parenting time enforcement. As a result, the Friend of Court program experienced funding cuts in 1998.

[196] Joseph G. Salamone, Oakland Country Friend of the Court. Presentation to the Michigan Congressional Family and Civil Law Workgroup on Friend of the Court Projects, April 13, 2000.

[197] A parental education video entitled *Parenting Time: It's in Your Hands* and a staff video entitled *Making a Difference: Parenting Time and the Friend of the Court*, prepared by the State Court Administrative Office of Michigan are available.

[198] Joseph G. Salamone, Oakland Country Friend of the Court. Presentation to the Michigan Congressional Family and Civil Law Workgroup on Friend of the Court Projects. April 13, 2000.

mediation so that families can resolve their own disputes outside the adversarial process.[199] Friend of the Court offices are required by statute to provide voluntary mediation to help parties settle custody and parenting time disputes.[200] A mediator who conducts formal mediation pursuant to the *Friend of the Court Act* may not carry out other functions of the Friend of Court.[201] This restriction creates a difficulty for offices that have inadequate staff, which they avoid by contracting an outside agency to provide mediation services or by using "informal" voluntary mediation. As a result the Friend of the Court mediator may carry out investigative, enforcement or referee functions.[202]

Practices of the Friend of the Court vary from county to county. Irene Sivavajchaipong, Supervisor of Investigations at the Ingham County Friend of the Court office, explained how cases are treated in her office.[203] On intake, the office identifies cases that are likely to give rise to ongoing problems and recommends counselling or parenting programs, as appropriate. A "conciliator" meets with the parents to help them reach an agreement. The conciliator may see the children, but this is not standard practice. Conciliators recommend joint legal custody in almost all cases, unless there are serious intimidation problems, and try to maintain the status quo. When abuse is alleged, the conciliator recommends supervised access, preferably by a third-party volunteer. The Ingham County Friend of the Court office offers very limited supervision services, and there is a lack of supervised parenting time services in the county. When the parties do not reach an agreement, the conciliator makes a recommendation about custody and parenting time, to which the parties may agree. In any case, the judge almost always makes an order consistent with the recommendation. The office offers a parental education program consisting of a brochure and a video, which may be given before or after conciliation. When there are parenting time disputes after an order has been made, Ingham County uses parenting time "advocates" to enforce parenting time orders.

The Friend of the Court program is required by statute to enforce parenting time orders. When an office receives a written complaint, and staff have reason to believe that a violation of a parenting time order has occurred, the office sends a notice to the custodial parent requiring a response within 14 days. After 14 days, the Friend of the Court may 1) schedule a meeting with both parties to try to resolve the problem, 2) refer the parties to mediation if they agree, 3) proceed under the *Support and Parenting Time Enforcement Act* with sanctions, including make-up parenting time and contempt proceedings, or 4) petition for a variation of the parenting time provisions (Michigan, 2000a: 4-4-4-5). Informal mediation is often used by at least some Friend of the Court offices to try to resolve problems,[204] and the persuasive rather than punitive

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[199] John D. Ferry, State Court Administrator. Presentation to the Michigan Congressional Family and Civil Law Workgroup on Friend of the Court Projects. April 13, 2000.

[200] *Friend of the Court Act*, s.13(1).

[201] *Friend of the Court Act*, s.15.

[202] Interview with Sharon Deja, Manager, Friend of the Court Bureau, April 13, 2000.

[203] Interview with Irene Sivavajchaipong, April 13, 2000.

[204] Interview with Irene Sivavajchaipong, Supervisor of Investigations, Ingham Country Circuit Court, Family Division. April 13, 2000.

approach is popular with at least some non-custodial fathers, who perceive that punitive measures simply make the custodial mother mad and do not solve the problem.[205]

Every circuit court in Michigan is required by statute to have a make-up parenting time policy that includes the following elements:

- the make-up parenting time must be of the same type and duration as the parenting time that was denied;
- it must take place within one year after the wrongfully denied parenting time; and
- the make-up parenting time must take place at a time chosen by the non-custodial parent.[206]

In order to obtain make-up time, the non-custodial parent must give the Friend of the Court office notice of denial of parenting time. Within five days of the notice, the Friend of the Court must decide if it will act and must notify the custodial parent of its decision. The custodial parent must respond within seven days. When the custodial parent contests the claim that parenting time was denied, a hearing is held before a referee (who is a member of the Friend of the Court office) or the court. When the hearing is before a referee, either party, when dissatisfied with the result, is entitled to a *de novo* hearing before a judge (Michigan, 2000a: 4-5).

When make-up parenting time does not help resolve a dispute and civil contempt proceedings are appropriate, the Friend of the Court office must commence such proceedings by filing a petition for an order to show cause why the parent who has violated the parenting time order should not be held in contempt. The office must give notice to the subject parent of possible sanctions and of the right to request a hearing on modification of parenting time. When the parent requests a modification within 14 days of the notice, the court must hold a hearing unless the dispute is otherwise resolved. The court may combine the modification and show cause hearings, in which case the modification hearing must be held first. The court may impose the following sanctions:

- require additional terms and conditions consistent with the parenting time order;
- modify the parenting time order to meet the best interests of the child, after notice to both parties and a hearing, when requested by a party;
- order that make-up parenting time be provided for the non-custodial parent;
- order the parent to pay a fine of not more than $100;

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[205] Interview with Dave Whitehead, past president of Capital Area Fathers for Equal Rights and a former client of the Ingham Country Friend of the Court program, April 13, 2000. Fathers' rights groups have been active in pushing for reforms in Michigan. Currently, one group is advocating for presumptive joint physical custody. Interview with Murray Davis, Executive Director, and Eldridge Mason, Director, Public Relations of DADS of Michigan, April 13, 2000.

[206] *Support and Parenting Time Enforcement Act*, 552.642, s.42.

- commit the parent to jail for no more than 45 days for a first offence and 90 days for subsequent offences (with or without work-release privileges); or,

- condition the suspension of the parent's occupational licence, driver's licence, recreational or sporting license on non-compliance with an order for make-up and ongoing parenting time (Michigan, 2000a: 4-5, 4-6).

Outside Michigan, access orders are not enforced by state agencies but by individual parties. Tort actions are available in some American states, but have not been a particularly effective means of getting the relationship between the child and the non-custodial parent "back on track," although some commentators have supported the use of such actions (e.g., Geismann, 1993: 606-608). The few reported U.S. cases of tort claims for interference with a parent's visitation rights have had mixed results, dependent on the factual background of each case. Generally the tort actions are brought long after the event, when there is no hope of re-establishing a relationship, and such actions focus on compensation for a parent rather than on ensuring that access takes place.[207] Some U.S. courts have dismissed tort actions for interference with visitation or for intentional infliction of emotional distress, reasoning that the power to punish for contempt can be used to coerce compliance with the access order, and that a tort remedy, therefore, is superfluous and, potentially, produces excessive litigation.[208]

Courts across the U.S. may fine or imprison custodial parents for wilful contempt of access orders, and often do so without referring to the best interests of the child.[209] States differ in their approach to contempt proceedings when a child refuses access. In Michigan, the Friend of the Court of Ingham County said that access orders are not enforced when the child is 16 years of age or older and does not want to see the non-custodial parent, but that access orders are enforced, even to the point of jailing the custodial parent for contempt, when a capable child below the age of 16 refuses to comply.[210] Some U.S. courts have found children in contempt for refusing access (Murray, 1999). The Illinois Court of Appeals, for example, affirmed a finding of contempt against two sisters, aged 8 and 12, who adamantly refused to visit their father, but ruled that the order of incarceration be reversed and the case remanded so that alternatives to incarceration could be considered.[211] The Court of Appeals affirmed that children could be incarcerated for contempt of a visitation order, even though they were not parties to the proceeding, but that less intrusive alternatives should be considered first.

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[207] See, for example, the first U.S. case that allowed recovery for interference with visitation rights, *Ruffalo* v. *United States*, 590 F.Supp. 760 (Mo. 1984). This case had an unusual factual background. The non-custodial mother's action against the government for interference with visitation and communication rights was upheld because her son was in the Federal Witness Protection Program.

[208] See, for example, *Gleiss* v. *Newman*, 415 N.W.2d 845 (Wis. App. 1987).

[209] *Tangeman* v. *Tangeman* (2000 WL 217284 (Ohio App. 2 Dist.): The custodial mother was imprisoned for three days and fined $500 in costs for contempt of visitation order); *Matter of Munz and Munz*, 242 A.D.2d 789, 661 N.Y.S.2d 882: custodial mother was imprisoned for 30 days for contempt of visitation order; *In re Tammy D. Keaton, Relator* (2000 WL 301189 (Tex.App._Amarillo)).

[210] Interview with Irene Sivavajchaipong, Supervisor of Investigations, Ingham County Circuit Court, Family Division, April 13, 2000.

[211] *In re Marriage of Marshall*, 663 N.E.2d 1113 (Ill.App. 3 Dist.,1996).

Some courts express reluctance to imprison custodial parents for contempt when children refuse access. The North Carolina Court of Appeals set aside an order committing a custodial mother to jail for 30 days for contempt, when the child refused access, because there were no "findings that the incarceration of the plaintiff is reasonably necessary to promote and protect the best interests of the child." There was no evidence that the mother wilfully failed to comply, rather she "did everything possible short of using physical force or a threat of punishment to make the child go with his father."[212] The non-custodial father could have sought an order forcing the child to visit, but such orders should be granted

> only when the circumstances are so compelling and only after he has done the following: afforded to the parties a hearing in accordance with due process; created a proper court order based on findings of fact and conclusions of law determined by the judge to justify and support the order; and made findings that include at a minimum that the drastic action of incarceration of a parent is reasonably necessary for the promotion and protection of the best interest and welfare of the child.[213]

The U.S. has ratified the Hague Convention on the Civil Aspects of International Child Abduction and effectively implemented it.[214] One of the few American cases to address directly the protection of access rights under the Convention is *Viragh* v. *Foldes*.[215] In that case, the access father sought return of his children to Hungary or, alternatively, requested that the custodial mother be ordered to send the children to Hungary at least twice a year. The father's Hungarian access order provided for access on alternate weekends, two weeks each in July and August, and three days during the children's winter and spring holidays. The mother had relocated to the United States without informing the father beforehand.

The court rejected that father's argument that the mother's removal violated his rights of custody and determined that the father had rights of access only. The court noted that the Convention does not require mandatory return of a child to enforce rights of access, but that there is discretion to do so under article 18 of the Convention. The court further noted that article 26 provides that the parent who has removed the children from their habitual residence, and made the exercise of access rights more difficult, may be ordered to pay the necessary expenses incurred by the non-custodial parent to exercise rights of access. As well, said the court, article 21 of the Convention

> recognizes that a judge may not enter a visitation order which is impractical. By instructing the judge to remove, "as far as possible," all obstacles to the exercise of access rights, the Convention emphasizes that the judge must consider all practical limitations.[216]

With these principles in mind, the court supported the reasoning of the lower court judge who refused to allow access in Hungary because of the risk that the children would not be returned.

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[212] *Hancock* v. *Hancock*, 471 S.E.2d 415 (N.C.App.,1996) at 419.

[213] *Ibid.* See also *Mintz* v. *Mintz*, 64 N.C.App. 338, 307 S.E.2d 391 (1983).

[214] The Convention was implemented by the federal *International Child Abduction Remedies Act*, 42 USCA s 11601 (1988).

[215] *Viragh* v. *Foldes*, 612 N.E.2d 241 (Mass. 1993).

[216] *Ibid.* at 249.

This judge ordered two access visits a year in America with the mother to reimburse the father for his expenses. The court rejected the father's argument that the children should be returned to Hungary so that the authority there could determine the appropriate visitation order, stating that the Convention, in articles 21 and 26, "contemplates that the judicial or administrative authorities in the "requested State," or the nation in which the children currently reside, have jurisdiction over visitation matters."[217] Furthermore, the court rejected the father's argument that the judge should have made an access order that was a "mirror image" of the Hungarian order, stating that the Convention does not require that a mirror image visitation order be entered because such a requirement would be impractical. The court added, however, that to the extent practical the Hungarian access order should be followed during the children's stay in the United States.

The father objected that the access order was meaningless because he could not afford to travel to or live in the U.S. The court had ordered the mother to reimburse him for the expenses of exercising access in the U.S., but this order did not address his inability to purchase an airline ticket in the first place. The court remanded the case to the lower court to address that problem. The court denied the father's request for costs, stating that costs are mandated when an order for return of a child is made but not for an access order. The legal costs of enforcement may prevent impecunious access parents from pursuing a remedy. Horstmeyer commented as follows:

> This case illustrates the Convention's ineffectiveness in its attempt to fashion remedies for the protection of international access rights. In this case, the non-custodial parent was financially unable to exercise his access rights in the United States. This is not surprising because salaries and the cost of living in the United States are much higher than those in many foreign nations, such as Hungary. Thus, the reimbursement arrangement was not feasible. Upon remand, the court likely will instruct Foldes to pay an initial fee for Viragh's travel and reasonable living expenses, rather than allowing her to reimburse him at the conclusion of his visit. Nevertheless, one can only wonder what the courts will do when confronted with the case of two indigent parents. In such a case, no remedy may exist. Furthermore, as in Viragh, a non-custodial parent may obtain a less favourable visitation arrangement than the original court mandated in its custody order. Such a result rewards the custodial parent for fleeing the habitual residence to limit the former spouse's access to the child. This is troublesome because the non-custodial parent may become frustrated when attempting to exercise valid access rights. This could create an incentive for even more child abductions (Horstmeyer, 1995: 184).[218]

A more recent decision confirms that the Convention is of little assistance for parents who have only access rights. In *Bromley* v. *Bromley*, the court ruled that the Convention does not provide a remedy for violation of access rights, so the non-custodial parent must apply to state courts under domestic laws for assistance.[219]

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[217] *Ibid.* at 249.

[218] See also Steward (1997).

[219] *Bromley* v. *Bromley*, 30 F.Supp.2d 857 (Penn. U.S. Dist. Ct. 1998).

U.S. courts have adopted the view that a non-removal law, agreement or order creates "rights of custody" within the meaning of the Convention, so that a custodial parent who removes the child in that context will be ordered to return the child (Silberman, 1994).[220]

Attempts in the U.S. to enforce access orders against non-custodial parents have not been very successful. An order of the trial judge that a non-custodial father pay the mother $20 for each day he failed to exercise access was set aside on the grounds that the obligation of a non-custodial parent, to visit a child is only a moral and not a legal duty.[221] More promising have been various initiatives to encourage continuing involvement by the non-custodial parent through parental education programs and other preventive measures. Michigan does not enforce access orders against the non-custodial parent, but Michigan's Friend of the Court has emphasized education and counselling to encourage non-custodial fathers to maintain or develop a relationship with their children. The Forget Me Not program developed by Oakland County's Friend of the Court two years ago, discussed above, is specifically aimed at encouraging unmarried non-custodial fathers to be involved with their children.

4.2 Australia

In 1995, the Australian Law Reform Commission called for early identification and intervention in "complex contact cases," noting that "cases that become locked in conflict harm the children and the parents and waste limited Court and other legal resources" (ALRC, 1995b: para. 3.2). The Commission considered various factors that could identify an access case as likely to give rise to ongoing conflict and problems and made the following recommendation:

> There should not be a formal checklist of factors to be taken into account in identifying complex contact cases. Identification should involve an assessment of the case as a whole by the responsible officer of the Court. Officers should be aware, however, of four key indicators arising from the research into complex contact cases: continuing conflict between the parties; children under 2 years at the time of separation; allegations that the children refuse or oppose contact; restraining order application as part of the initiating application (ALRC, 1995b: recommendation 3.3).

The Commission also stressed that access should not be ordered unless it is in the best interests of the child, because failure to adhere to this standard violates the principles enshrined in the UN Convention on the Rights of the Child and Australia's legislation, and also adds to the number of complex contact cases (ALRC, 1995b: paras. 2.2 and 2.48). Among its many recommendations for dealing with complex contact cases, the Australian Law Reform Commission made the following:

> The Family Court should be more robust in refusing to make contact orders where it is not in the best interests of the child to order contact.... [C]ontact may be particularly inappropriate where there is a history of violence in the parents' relationship, where there is continuing conflict between the parents or where the child opposes contact. In considering whether the child opposes contact the Court should consider, among other

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[220] *David S.* v. *Zamira*, 151 Misc.2d 630, 574 N.Y.S.2d 429 (Fam.Ct.1991), aff'd *In re Schnier*, 17 F.L.R. 1237 (N.Y.App.Div.2d Dep't).

[221] *Hathcock* v. *Hathcock*, 685 So.2d 736 (Ala. Civ. App. 1996).

> factors, the age and maturity of the child and any parental influence (ALRC, 1995b, recommendation 2.7).

This recommendation did not mean that access is never appropriate when there is a history of violence or continuing parental conflict or the child opposes access, only that one or more of these circumstances is likely to form the factual background of the cases in which access is not in the best interests of the child.

The Commission's 1995 report also noted that judges were reluctant to enforce access orders partly because exercise of the power to punish for contempt was inconsistent with a judge's role as protector of the best interests of the child:

> The Family Court was consciously shying away from imposing sanctions on those who deliberately refuse or fail to obey its orders. This response reflected the court's fundamental dilemma. The Family Court is often described as a helping court in which conciliation is stressed. However it also has potentially draconian powers for contempt.... This dilemma is magnified by the court's overriding duty to take the interests of the children of a marriage as the paramount consideration. The merits of a case may point toward the imposition of a severe penalty but concern for the children suggests a more lenient approach (ALRC, 1995b: para. 4.56).

The Commission rejected transfer of custody as a method of access enforcement, concluding that "it would be very undesirable for the Court to threaten a person in an enforcement action with loss of custody. Applications for changes in custody should be considered on their own merits and after proper consideration of the best interests of the child" (ALRC, 1995b: para 5.27).

Subsequent to the Australian Law Reform Commission's report, Australia's *Family Law Act 1975* was amended. Australia's *Family Law Reform Act 1995*, like the *Children Act 1989* of England and Wales, abandoned the terms custody and access and adopted the terms residence and contact. While there may be one "residential" parent and one "contact" parent, both parents continue to have parental responsibility for their children after separation. The Act incorporates a statement of objects and principles drawn from the UN Convention on the Rights of the Child.

In Australia, marriage, divorce, custody and access are matters of federal legislative authority, and a single national court deals with family law matters. Australia's Family Court has counselling and mediation services connected to it, and judges emphasize these preventive and alternative measures. As well, the Attorney General's Department of Australia contracts community-based organizations to provide supervised contact services. There are 10 contact services funded across Australia. The services are conducted by a range of community-based organizations, including community legal services and family services organizations. The contact services provide supervised contact and transfers. An evaluation of the services, including research on the impact on children of supervised contact, was conducted and the first report published in 1998 (Australia, 1998b). The contact services are successful in some regards. Resources are a problem and many services are unable to help parents move to unsupervised contact.

The goal of keeping non-custodial fathers connected to their children after separation is reflect in the principles of the *Family Law Act 1995*, which are set out in section 60B.(2):

> except when it is or would be contrary to a child's best interests:
> (a) children have the right to know and be cared for by both their parents, regardless of whether their parents are married, separated, have never married or have never lived together; and
>
> (b) children have a right of contact, on a regular basis, with both their parents and with other people significant to their care, welfare and development; and
>
> (c) parents share duties and responsibilities concerning the care, welfare and development of their children; and
>
> (d) parents should agree about the future parenting of their children.

Under section 68F(2) of the Act, when determining what is in the child's best interests, the Family Court must consider the following:

a) any wishes expressed by child and any other factors the Court thinks relevant to the importance given to child's wishes;
b) the nature of the relationship of the child with each parent and other people;
c) the likely effect of changes in the child's circumstances, including separation from either parent or any other person (adult or child);
d) the practical difficulty and expense of a child having contact with a parent and whether this will affect the child's right to maintain a relationship and contact with both parents;
e) the capacity of each parent or others to provide for the needs (including emotional and intellectual) of the child;
f) the child's maturity, sex and background (including any need to maintain a connection with the lifestyle, culture and tradition of Aboriginal people or Torres Strait Islanders) and any other characteristic considered relevant;
g) the need to protect the child from physical or psychological harm caused or potentially caused by: being subjected or exposed to abuse, ill-treatment, violence or other behaviour;
h) being present while another person is subjected or exposed to abuse, ill-treatment, violence or other behaviour;
i) the attitude demonstrated by each parent to the child and to responsibilities of parenting;
j) any family violence order which applies to child or member of child's family;
k) whether it would be preferable to make the order that would be least likely to lead to further proceedings in relation to child;
l) any other factor considered by court to be relevant.

Abuse and violence are included as factors to consider (factors g), h) and j)). However, inappropriate access orders and agreements in the context of domestic violence continue to be a problem in Australia, particularly since the *Family Law Reform Act 1995* came into force. This

is because the emphasis in the new legislation on continuing the parental relationship has made judges even more reluctant to deny access (Rhoades et al., 1999).

The child's wishes must be considered by the court when determining access under section 68F(2)(a) of the *Family Law Act 1995*. Under section 68G(2), the court may inform itself of the child's wishes by means of a report in which the child's wishes are set or by such other means as the court considers appropriate. Under section 68L, the court may order separate representation for the child, either on its own initiative or on application by the child, by an organization concerned with the welfare of children, or by any other person, when the court considers it appropriate. A child may apply for an access order under section 69C(2)(b).

Measures to enforce contact orders were included in subsections 112AA-112AP of the *Family Law Act 1995*. Concerns have been raised in Australia about the use of enforcement mechanisms by abusive non-custodial fathers to harass custodial mothers (Rhoades et al., 1999). The *Family Law Amendment Bill 1999* came before the Parliament of the Commonwealth of Australia in 1999. This Bill was, in part, intended "to streamline and enhance the enforcement of parenting orders by the introduction of a new three-stage parenting compliance regime" (Australia, 1999: 1).

This regime comprised a prevention stage, a remedial stage and punitive sanctions, as recommended by the Family Law Council of Australia (Australia, 1998a). In the prevention stage, a lawyer or the court explains to each party the obligations created by a parenting order, the availability of programs to help people understand their parental responsibilities, the consequences of non-compliance with orders, and the availability and use of location and recovery orders to ensure that parenting orders are complied with.[222]

The remedial stage is intended to enable parents to resolve disputes and to help in negotiations about improved parenting. In the remedial stage, when a party disobeys an order without reasonable excuse, the court would be able to a) make an order requiring the person to participate in a parental education program, provided the program is within reasonable distance or b) order compensatory contact.[223]

The punitive stage is intended to be a last resort to ensure that a parent is punished for deliberate disregard of a court order. When parental education or compensatory contact has been ordered and the person afterwards contravenes an order without reasonable excuse, the court must impose one or more of a range of sanctions, including community service orders, fines, bonds, variation of a parenting order or imprisonment. These sanctions exist under the current law but are discretionary. The Bill removed this discretion.[224]

The general reaction to the Bill was that it is too severe and too rigid, although the Senate Committee comments that this may be because of "a failure to appreciate that a person can only be punished if he or she has no reasonable excuse for breach of a contact order" (Australia, 1999: 7). Rhoades, Graycar, and Harrison, who are conducting research on the impact of the *Family Law Act 1995* (Rhoades et al., 1999), testified in front of the Senate Committee that the

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[222] Family Law Amendment Bill 1999 (Cwth), No. , 1999, s.65DA.
[223] Family Law Amendment Bill 1999 (Cwth), No. , 1999, ss.70NG, 70NH and 70NI.
[224] Family Law Amendment Bill 1999 (Cwth), No. , 1999, s.70NJ.

emphasis on improving enforcement of contact orders was inappropriate, given their findings that inappropriate contact orders are being made, particularly in situations of domestic violence (Australia, 1999: 8-9). The authors commented that the new enforcement provisions would become "another instrument of harassment, or for the assertion of rights to contact in inappropriate circumstances" (Australia, 1999: 10). Parkinson told the Senate Committee that the problem was the lack of public confidence in the courts to make just contact orders in the first place in cases with serious concerns about the safety of the children, that interim contact orders are made with minimal assessment, that many litigants represent themselves and do so with difficulty, and that these serious problems would "not necessarily be resolved by counselling" (Australia, 1999: 10). The Bill has gone back to the Attorney General for consideration of suggested amendments. As of May 18, 2000, the Attorney General had not yet come forward with an amended Bill.

Under section 67ZD of the current statute, courts are authorized to order that the passport of the child and of any other person concerned be delivered up to the court, when the court considers that there is a possibility or threat that a child may be removed from Australia. Such an order would help prevent international parental child abduction.

Australia has ratified the Hague Convention on the Civil Aspects of International Child Abduction and effectively implemented it. Most abductions that are governed by the Convention are by primary caregiver mothers, and most others by non-custodial fathers (in Australia, as in Canada, the U.S., and the U.K., most primary caregiver or custodial parents are mothers[225]) (Nygh, 2000). Australian courts have ruled that in cases of non-removal orders, agreements or laws, the non-custodial parent does have a right of custody within the meaning of the Convention (Nygh, 2000). Australia's *Family Law Act* expressly provides in section 111B that "each of the parents of a child should, subject to any order of a court for the time being in force, be regarded as having custody of the child," thereby allowing the non-custodial parent to apply for an order for return of the child when the custodial or primary caregiver parent removes the child without the other parent's consent or a court order.

Australia has also imposed a penalty of imprisonment for up to three years for removing a child from Australia when a contact order is in force, without either consent of the person in whose favour the access order was made or order of the court.[226]

When a child is in Australia, a person in whose favour a contact order was made may apply for a "location order," which requires a person or government department or agency to provide the Registrar of the court with information that the person has or obtains about a child's location.[227] As well, a non-custodial parent may apply for a "recovery order" that does the following:

- requires the return of a child to the non-custodial parent;

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[225] In Australia, 19 percent of families with dependent children are one-parent families, and 87 percent of one-parent families are headed by mothers (ABS Australian Social Trends, 1997: 34).

[226] *Family Law Act 1975*, CWTH, s. 65Y.

[227] *Family Law Act 1975*, CWTH, ss. 67J and 67K (b).

- authorizes or directs a person or persons, with such assistance as they require, and if necessary by force, to stop and search any vehicle, vessel or aircraft, and to enter and search any premises or place, for the purpose of finding a child; and

- authorizes or directs a person or persons, with such assistance as he or she requires or they require, and if necessary by force, to recover a child.[228] Interference with a recovery order without reasonable excuse is punishable by a fine of up to $1,000, imposition of a recognizance, or imprisonment for up to three months.[229] Australia's statute states explicitly that the best interests of the child are the paramount consideration when determining whether to grant a location order or a recovery order.[230]

In Australia, a contact order imposes no legal obligation on the non-custodial parent to exercise access, only obligations on others not to "hinder or prevent a person and the child from having contact in accordance with the order" and not to "interfere with the contact that a person and the child are supposed to have with each other under the order."[231] The issue of failure to exercise access was raised before the Senate Committee on the Family Law Amendment Bill 1999. A custodial parent testified that "the consequences for the residence parent of a contact parent failing to turn up for access visits, giving late notice of an intention to do so, or giving notice after a failure to attend, include inconvenience, financial costs, emotional trauma for the children and a reduced ability to plan" (Australia, 1999: 12). The Domestic Violence Advocacy Service and the Women's Legal Resource Advocacy Centre also addressed the Senate Committee on this issue. As a result, the Attorney General's Department has undertaken to discuss the possibility of providing that a right to contact will lapse if not exercised over a reasonable period of time (Australia, 1999: 12).

4.3 Europe

All Council of Europe (European) countries are parties to the UN Convention on the Rights of the Child. In some European states, access is considered a right of the parent, while in others it is treated also or solely as a right of the child. Most countries extend to parents a right of access in so far as it is in the child's interest (Council of Europe, 1999: 10).[232]

The English Court of Appeal, in *Re M*, while reiterating that there is a presumption in favour of maintaining access with a parent, also stated that each case must be decided on its own facts and that courts should ask in each case whether the emotional need of a child to have an enduring relationship with both parents is outweighed by the risk of suffering if access were ordered.[233] Some commentators interpreted *Re M* to mean that a parent seeking access now has the burden of proving that the access would be in the best interests of the child. In contrast, most researchers continue to find that courts apply a strong presumption in favour of access despite an

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228 *Family Law Act 1975*, CWTH, ss. 67Q (a)(i) and (ii), (b) and (c), and 67T (b).

229 *Family Law Act 1975*, CWTH, ss. 67X.

230 *Family Law Act 1975*, CWTH, ss. 67L and 67V.

231 *Family Law Act 1975*, s. 65N.

232 Note that the Council of Europe, 1999 paper included information about 26 member states of the Council of Europe.

233 *Re M (Contact: Welfare Test)* [1995] 1 FLR 274 (C.A.).

increasing consensus among researchers that such a presumption undermines the best interests of the child (Smart & Neale, 2000: 168; Cantwell et al., 1999).

Domestic violence was historically considered to be a private family problem in England and Wales (Hester & Radford, 1996). Recently the issue has been given more attention and amendments have been made to the *Children Act 1989* by the *Family Law Act 1996* to address domestic violence. There continue to be concerns, however, that courts, lawyers and other professionals do not properly investigate whether there has been domestic violence (England and Wales, 2000; Barnett, 1999). Domestic violence is not a bar to contact (access). Wall J. has said that "domestic violence can only be one factor in a very complex equation. There will be contact cases in which it is decisive against contact. There will be others in which it is peripheral."[234]

Many European countries use mediation or counselling to resolve access disputes initially and for ongoing problems, and its use is growing. Mediation or counselling is almost always voluntary (Council of Europe, 1999: 14).

In Europe, the remedies for access denial are varied. In almost every European country, apprehension of a child to enforce an access order is impossible when the child is sufficiently mature and genuinely opposes access, but in Bulgaria apprehension may be ordered when the child has received psychological counselling and remains opposed (Council of Europe, 1999: 13). Forced apprehension of the child after counselling is also available in Italy and Sweden. Criminal penalties may be imposed against the custodial parent in Belgium, Italy (imprisonment for up to three years), Norway (a fine, but not when the child opposes access), Sweden (a fine) and the U.K. (imprisonment if it is in the child's interest). Applications to vary custody or to vary or eliminate access may be made, usually with the requirement that a change in circumstances be proven and that the order sought serve the interests of the child (Austria, Belgium, Bulgaria, Czech Republic, Denmark, France, Luxembourg, Malta, Moldova, Poland, Switzerland and the U.K.). Mediation may be ordered in Poland (Council of Europe, 1999: 33-39).

In England and Wales, imprisonment for contempt has generally been considered a remedy of last resort, and "in family cases they should be the very last resort."[235] Most courts consider that imprisonment threatens the interests of the child.[236] In a discussion of sanctions for contact denial, one author wrote that "attachment of a penal notice to a contact order... or proceeding towards committal, will rarely—if ever—be in the interests of the child" ("Enforcement in Children Act Proceedings," 1995: 227). Nevertheless, imprisonment is ordered in some cases. A custodial mother who was "implacably hostile" to contact was imprisoned for six weeks for repeated contempt of a contact order, and the Court of Appeal stated that the welfare of the child, while a material factor, was not the paramount consideration when considering whether to commit a parent for "flagrant breach" of a contact order.[237] More recently, the Court of Appeal set aside an order to imprison a mother for contempt of a contact order because the father did not wish for an order of imprisonment and the lower court had instigated committal proceedings on

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234 *Re H (Contact: Domestic Violence)* [1998] 2 FLR 42 (C.A.) at 56.

235 *Ansah* v. *Ansah* [1977] Fam 138.

236 *Re H (Contact Enforcement)* [1996] 1 FLR 614 (Fam. Div.).

237 *A* v. *N (Committal: Refusal of Contact)* [1997] Family Law 145 (C.A.).

its own initiative.[238] In his discussion of this case, in which he acted for the mother, Sharpe commented as follows:

> [I]n difficult contact cases, the courts should be astute, perhaps more astute than some have been in the past, to make detailed inquiries into the reasons for the breakdown in contact. If a mother is perceived to be hostile, searching inquiries must be made to discover the reasons behind it. If contact is to succeed, it can only do so properly if the mother supports it. If domestic violence is alleged, it must be investigated so that the court is able to make findings and weigh its impact on the decision-making process. The mother's mental and emotional state must be carefully evaluated, almost always with help (Sharpe, 1999: 409).

There is no sanction for failure to exercise access in many European countries, including Austria, Germany, Greece, Hungary (even though Hungary has enacted a statutory duty to exercise access), Liechtenstein, Luxembourg, Moldova, Slovenia, and Sweden. Failure to exercise access may result in a withdrawal of access or of parental authority in Belgium (in extreme cases only), Denmark (if there has been no contact for five years), France, Italy, Norway, Poland and Switzerland. Pecuniary compensation for the custodial parent may be ordered in Belgium. Counselling or mediation may be used on a voluntary basis in Cyprus and Finland. Children may seek a court order for the parent to exercise access in the Netherlands and in the U.K. (Council of Europe, 1999: 33-39).

Most European countries are parties to the Hague Convention on the Civil Aspects of International Child Abduction. The English Court of Appeal has ruled that a non-removal order, agreement or law gives rise to "rights of custody," and that a custodial parent who removes or retains a child in violation of such an order, agreement or law may be ordered to return the child home.[239] French and Israeli courts have adopted the same view (Silberman, 1994).

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238 *Re M (Contact Order: Committal)* [1999] 1 FLR 810 (C.A.).

239 *Re C (A Minor) (Abduction)*[1989] 1 FLR 403, [1989] 1 W.L.R. 656 (C.A.).

5.0 CONCLUSIONS

The major question related to access enforcement is whether or not governments will take on the responsibility to provide preventive, alternative and enforcement services for access disputes. If a court-connected office similar to Michigan's assumed these responsibilities, this would help parents and children who are experiencing difficulty with access. A system that ensured that preventive and alternative measures were used before the matter was taken to court would address the problem of courts having to deal with access disputes for which they are not the appropriate forum,[240] and presumably would reduce the number of disputes that would proceed to a hearing. Assigning enforcement responsibility to a court-connected office may also alleviate the problem identified in Australia of non-custodial parents using enforcement proceedings to harass the custodial parent—the office would be responsible for filtering out unfounded or frivolous claims.

Providing preventive, alternative and enforcement services would require significant resources, however, and, therefore, governments may not want to assume responsibility. If governments took responsibility for providing preventive, alternative, and enforcement services, and then did not provide adequate resources for these services, there would almost certainly be considerable dissatisfaction among clients. This has been the experience in Michigan, where the Friend of the Court office is underfunded, caseload levels are unmanageably high, and there are large numbers of complaints filed each year about the office. Even a properly funded office would likely generate complaints because of the nature of the custody and access issues.

Apart from creating a court-connected office with responsibility for custody and access disputes, the federal, provincial and territorial governments may wish to take some smaller steps to improve the way in which access disputes are dealt with by making some statutory amendments and providing some additional services. Some suggestions for these are outlined below.

Based on the review of the literature, statutes and case law relating to access disputes, the following are suggested:

1. Implementation of the UN Convention on the Rights of the Child be part of the law reform process in relation to access enforcement;

2. The custody and access statutes of each jurisdiction include a list of factors that the court should consider when determining the best interests of the child, and the principle of maximum contact be only one of the factors to consider;

3. The legislation of all jurisdictions require that all access orders and variations of access orders be based on the best interests of the child;

4. The legislation of all jurisdictions require that the views of the child be considered, when the child is capable of providing them, and given due weight when determining what access arrangements are in the best interests of the child;

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[240] See, for example, *Reithofer* v. *Dingley*, [2000] O.J. No. 1132 (Sup. Ct. Just.).

5. The legislation of all jurisdictions provide that domestic violence is a factor that negatively affects the ability of the abuser to parent and that should be considered when determining custody and access;

6. The legislation of all jurisdictions provide that the best interests of the child be a primary consideration in any proceedings for enforcement of access orders, including contempt proceedings and applications for apprehension orders;

7. Provinces and territories set up a screening system for contested custody and access cases, early identification of difficult cases, and provide services to address issues that are likely to give rise to ongoing access enforcement problems;

8. Specific access orders that the parents and enforcement officers can easily understand be made when ongoing access problems are likely in order to prevent disputes and facilitate enforcement actions;

9. Provinces and territories set up a system for evaluating complaints of access denial and failure to exercise access to determine the appropriate course of action;

10. Provinces and territories provide either mandatory or voluntary parental education for all contested custody and access disputes;

11. All provinces and territories give courts the explicit authority to order parental education in cases of access denial or failure to exercise access;

12. Provincial and territorial legislation authorizing courts to order mediation be repealed;

13. All provinces and territories provide voluntary mediation services for custody and access disputes and set standards for those services;

14. All jurisdictions authorize courts to order that access be supervised when necessary to protect the best interests of the child;

15. All provinces and territories allow supervised access to be ordered in cases of wrongful denial of access or failure to exercise access;

16. All provinces and territories provide supervised access facilities and the necessary services to address the problems that created the need for supervision;

17. All provinces and territories develop a statutory definition of wrongful access denial and provide remedies for access denial only when it is wrongful;

18. All jurisdictions authorize courts to order compensatory access;

19. All provinces and territories authorize courts to order compensation for expenses incurred as a result of wrongful access denial or wrongful failure to exercise access;

20. All provinces and territories allow apprehension and delivery of a child by a law enforcement officer or other person to a person entitled to access;

21. All provinces and territories provide training for enforcement officers, and allow only trained enforcement officers to apprehend wrongfully withheld children;

22. All provinces and territories extend to inferior courts the power to impose specific penalties for non-compliance with access orders;

23. All provinces and territories provide that suspension of child support and transfer of custody may *not* be used as remedies for wrongful access denial;

24. No province or territory require that the custodial parent be ordered to provide the non-custodial parent with notice of an intended move and information on the new address when this would lead to harassment, abuse, serious harm or injury of the custodial parent or child;

25. All provinces and territories consider giving courts the authority, in the context of likely violation of a non-removal order or agreement, to order a person to a) transfer property to a trustee to be held subject to terms and conditions, b) make any child support payments to a trustee, c) post a bond payable to the applicant, or d) surrender his or her passport, the child's passport or other travel documents;

26. All provinces and territories allow courts to order that information needed to enforce an access order be given to the court, and that the court may then give the information to such person or persons the court considers appropriate;

27. All provinces and territories authorize courts to order the return home of a child who has been wrongfully removed to or retained in the jurisdiction, or when the court does not have jurisdiction;

28. All provinces and territories consider extending Legal Aid to qualifying parents who are attempting to enforce a right to access in cases governed by the Hague Convention on the Civil Aspects of International Child Abduction;

29. Central authorities continue to treat non-removal orders, agreements and laws as giving rise to rights of custody within the meaning of the Hague Convention on the Civil Aspects of International Child Abduction, and leave it for the courts to determine otherwise;

30. All provinces and territories provide for unilateral recognition and enforcement of foreign and extraprovincial access orders;

31. All provinces and territories consider creating a court-connected office responsible for providing intake of custody and access disputes, evaluation, parental education, mediation and supervised access, and for enforcing access orders when preventive and alternative measures fail.

APPENDIX A
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SUMMARY OF FEDERAL, PROVINCIAL AND TERRITORIAL STATUTES

1. BEST INTERESTS OF THE CHILD

Are access orders based on the best interests of the child standard?

Every jurisdiction except Alberta requires that access orders be based on the best interests of the child. British Columbia, New Brunswick, Newfoundland, the Northwest Territories, Nunavut, Ontario, Quebec, Saskatchewan and Yukon provide a list of factors to consider when determining what access order is in the best interests of the child. The federal government in the *Divorce Act*, and the laws in British Columbia, Manitoba, Newfoundland, the Northwest Territories, Nunavut, Ontario, Saskatchewan and Yukon specifically provide that the past conduct of a parent should not be considered unless it affects the ability to parent.

The *Divorce Act*, R.S.C. 1985 (2nd Supp.), c. 3, s. 16 (8) provides that, when making an access order, "the court shall take into consideration only the best interests of the child of the marriage as determined by reference to the condition, means, needs and other circumstances of the child." Section 16(9) specifically provides that past conduct of an applicant shall not be considered as conduct relevant to the ability to parent. The only specific factor to be considered is set out in section 16(10): "the court shall give effect to the principle that a child... should have as much contact with each spouse as is consistent with the best interests of the child."

In Alberta, the *Domestic Relations Act*, R.S.A. 1980, c. D-37, provides that when making an access order, the court "shall have regard: a) to the welfare of the minor; b) to the conduct of the parents; and c) to the wishes as well of the mother as of the father." *The Provincial Court Act*, R.S.A. 1980, c. P-20, s. 32, specifies that the court must have regard for the best interests of the child when making an order for custody and access.

In British Columbia, the *Family Relations Act*, R.S.B.C. 1979, c. 121, s. 24(1) provides that when making an access order, "the court must give paramount consideration to the best interests of the child, and in assessing those interests must consider the following factors and give emphasis to each factor according to the child's needs and circumstances: a) the health and emotional well-being of the child including any special need for care and treatment; b) if appropriate, the views of the child; c) the love, affection and similar ties that exist between the child and other persons; d) education and training for the child; and e) the capacity of each person to whom... access rights and duties may be granted to exercise these rights and duties adequately." Subsections 24(3) and (4) say that the court must not consider conduct of a person except when it affects a factor set out in subsection (1).

In Manitoba, the *Family Maintenance Act*, R.S.M. 1987, c. F.20, s. 2(1) provides that when determining access, the "best interests of the child shall be paramount." Under section 2(2), the court may consider the views and preferences of the child, when the court is satisfied that a child is able to understand the nature of the proceedings and the court considers that it would not be harmful to the child. Section 39(2) says that the court may order that "the non-custodial parent have access, at such times and subject to such conditions as the court deems convenient and just,

for the purpose of visiting the child and fostering a healthy relationship between parent and child."

In New Brunswick, the *Family Services Act*, S.N.B. 1980, c. F-2.2, s. 129(3), provides that the court may make an order for access and that the order is "to be made on the basis of the best interests of the child." Under section 1, the "best interests of the child" is defined as "the best interests of the child under the circumstances taking into consideration: (a) the mental, emotional and physical health of the child and his need for appropriate care or treatment, or both; (b) the views and preferences of the child, where such views and preferences can be reasonably ascertained; (c) the effect upon the child of any disruption of the child's sense of continuity; (d) the love, affection and ties that exist between the child and each person... to whom access to the child is granted...; ...(f) the need to provide a secure environment that would permit the child to become a useful and productive member of society through the achievement of his full potential according to his individual capacity; and (g) the child's cultural and religious heritage."

In Newfoundland, the *Children's Law Act*, R.S.N. 72 1990, c. C-13, section 31(1), provides that an application for access "shall be determined on the basis of the best interests of the child." Section 31(2) provides that when determining the best interests of the child in an application for access, the court "shall consider all the needs and circumstances of the child, including: a) the love, affection and emotional ties between the child and, i) each person entitled to or claiming... access to the child; ii) other members of the child's family who live with the child; and iii) persons involved in the care and upbringing of the child; b) the views and preferences of the child, where the views and preferences can reasonably be ascertained; c) the length of time the child has lived in a stable environment; d) the ability and willingness of each person applying for custody of the child to provide the child with guidance and education, the necessaries of life and the special needs of the child; e) the ability of each parent seeking the custody or access to act as a parent; f) plans proposed for the care and upbringing of the child; g) the permanence and stability of the family unit with which it is proposed that the child will live; and h) the relationship by blood or through an adoption order between the child and each person who is a party to the application." Under section 31(3), the court, when assessing a person's ability to act as a parent, "shall consider whether the person has ever acted in a violent manner towards: a) his or her spouse or child; b) his or her child's parent; or c) another member of the household, [and] otherwise a person's past conduct shall only be considered if the court thinks it is relevant to the person's ability to act as a parent."

In the Northwest Territories, the *Children's Law Act*, S.N.W.T. 1997, c. 14, section 17(1), and in Nunavut, the *Children's Law Act,* S.N.W.T. 1997, c. 14, s. 17 (1), as duplicated under the *Nunavut Act,* S.C. 1993 c. 28 as am., say that an application for access "shall be determined in accordance with the best interests of the child, with a recognition that differing cultural values and practices must be respected in that determination." Under section 17(2), when determining the best interests of the child on an application for access, "the court shall consider all the needs and circumstances of the child including: a) the love, affection and emotional ties between the child and (i) each person entitled to or seeking... access, (ii) other members of the child's family, and (iii) persons involved in the care and upbringing of the child; b) the child's views and preferences if they can be reasonably ascertained; c) the child's cultural, linguistic and spiritual or religious upbringing and ties; d) the ability and willingness of each person seeking custody to, directly or indirectly, provide the child with guidance, education and necessities of life and

provide for any special needs of the child; e) the ability of each person seeking custody or access to act as a parent; f) who, from among those persons entitled... access, has been primarily responsible for the care of the child, including care of the child's daily physical and social needs, arrangements for alternative care for the child where it is required, arrangements for the child's health care and interaction with the child through, among other things, teaching, playing, conversation, reading and discipline; g) the effect a change of residence will have on the child; h) the permanence and stability of the family unit within which it is proposed that the child live; i) any plans proposed for the care and upbringing of the child; j) the relationship, by blood or through adoption, between the child and each person seeking... access; k) the willingness of each person seeking custody to facilitate access between the child and a parent of the child who is seeking custody or access." Under section 17(3), the court, when determining the best interests of the child, "shall also consider any evidence that a person seeking... access has at any time committed an act of violence against his or her spouse, former spouse, child, child's parent or any other member of the person's household or family and any effect that such conduct had, is having or may have on the child." Section 17(4) provides that "a person's past conduct may be considered in an application [for access] only where the court is satisfied that it is relevant to the person's ability to act as a parent." Section 17(5) provides that "the economic circumstances of a person seeking... access are not relevant to the person's ability to act as a parent."

Nova Scotia's *Family Maintenance Act*, R.S.N.S. 1989, c. 160, section 18(5), provides that when considering an application for access, "the court shall apply the principle that the welfare of the child is the paramount consideration." Section 20 provides that the court may order the child to be brought before the court at any time during an application for access.

Ontario's *Children's Law Reform Act*, R.S.O. 1990, c. C.12, section 19(a), provides that one of the purposes of the custody and access provisions is to ensure that applications to the courts about access are determined on the basis of the best interests of the children. Pursuant to section 24 (1), the merits of an application for access "shall be determined on the basis of the best interests of the child." Section 24(2) provides that when determining the best interests of the child, "a court shall consider all the needs and circumstances of the child, including: a) the love, affection and emotional ties between the child and (i) each person entitled to or claiming... access to the child, (ii) other members of the child's family who reside with the child, and (iii) persons involved in the care and upbringing of the child; b) the views and preferences of the child, where such views and preferences can reasonably be ascertained; c) the length of time the child has lived in a stable home environment;... e) any plans proposed for the care and upbringing of the child;... g) the relationship by blood or through an adoption order between the child and each person who is party to the application." Under section 24(3) the past conduct of a person is not relevant to a determination of access "unless the conduct is relevant to the ability of the person to act as a parent of a child."

In Prince Edward Island, the *Custody Jurisdiction and Enforcement Act*, R.C.P.C. I. 1988, c. C_33, s. 2 (a), provides that one purpose of the Act is "to ensure that applications to the court in respect of custody of, incidents of custody of and access to, children will be determined on the basis of the best interests of the child." Under section 8, the court, when considering an access application, "shall take into consideration the views and preferences of the child to the extent that the child is able to express them" and "may interview the child to determine the views and preferences of the child."

In Quebec, article 33 of the *Civil Code of Quebec*, S.Q. 1991, c. 64, provides that "every decision concerning a child shall be taken in light of the child's interest and the respect of his rights. Consideration is given, in addition to the moral, intellectual, emotional and material needs of the child, to the child's age, health, personality and family environment, and to other aspects of his situation." Article 34 provides that "the court shall, in every application brought before it affecting the interest of a child, give the child an opportunity to be heard if his age and power of discernment permit it." Parents generally retain parental authority after separation, but article 606 provides that the court may, "for a grave reason and in the interest of the child," deprive a parent of parental authority or withdraw an attribute of parental authority. When both parents retain parental authority but have disagreements, then recourse may be had to article 604, which provides that "in the case of difficulties relating to the exercise of parental authority, the person having parental authority may refer the matter to the court, which will decide in the interest of the child after fostering the conciliation of the parties." The *Code of Civil Procedure of Quebec*, L.R.Q. c. C-25, article 816.3, provides for representation and hearing of children.

Saskatchewan's *Children's Law Act*, S.S. 1997, c. C_8.2, s. 9, provides that when making an access order, "the court shall: a) have regard only for the best interests of the child and for that purpose shall take into account: (i) the quality of the relationship that the child has with the person who is seeking access, (ii) the personality, character and emotional needs of the child, (iii) the capacity of the person who is seeking access to care for the child during the times that the child is in his or her care, and (iv) the wishes of the child, to the extent the court considers appropriate, having regard to the age and maturity of the child; b) not take into consideration the past conduct of any person unless the conduct is relevant to the ability of that person to care for the child during the times that the child is in his or her care." Under section 6(5), the courts, when making an order for custody or access, "shall a) give effect to the principle that a child should have as much contact with each parent as is consistent with the best interests of the child and, for that purpose, shall take into consideration the willingness of the person seeking custody to facilitate that contact."

Yukon's *Children's Act*, R.S.Y. 1986, c. 22, s. 1, provides that "this Act shall be construed so that in matters arising under it the interests of the child affected by the proceeding shall be the paramount consideration, and where the rights or wishes of a parent or other person and the child conflict the best interests of the child shall prevail." Section 29 states that one of the purposes of the custody and access provisions is "to ensure" that applications are determined "in accord with the best interests of the child." Section 30 (1) provides that when determining the best interests of the child in an access application, "the court shall consider all the needs and circumstances of the child including: a) the bonding, love, affection and emotional ties between the child and, (i) each person entitled to or claiming custody of or access to the child, (ii) other members of the child's family who reside with the child, and (iii) persons involved in the care and upbringing of the child; b) the views and preferences of the child, where such views and preferences can be reasonably ascertained, c) the length of time, having regard to the child's sense of time, that the child has lived in a stable environment, d) the ability and willingness of each person applying for custody of the child to provide the child with guidance, education, the necessaries of life and any special needs of the child, e) any plans proposed for the care and upbringing of the child, f) the permanence and stability of the family unit with which it is proposed that the child will live, and g) the effect that awarding custody or care of the child to one party would have on the ability of the other party to have reasonable access to the child." Section 30 (2) provides the past conduct

of a person is not relevant to a determination of an application for access "unless the conduct is relevant to the ability of the person to have the care or custody of the child." Section 30 (3) provides that there is no presumption that the best interests of the child are best served by placing the child with a female person rather than a male person nor the opposite. Section 30 (4) provides for a rebuttable presumption of joint legal custody.

Are the views of capable children taken into account?

As indicated above, British Columbia, New Brunswick, Newfoundland, the Northwest Territories, Nunavut, Ontario, Prince Edward Island, Quebec, Saskatchewan and Yukon require that the views of the child be considered, when the child is capable of giving them, and given due weight when determining what access arrangements are in the best interests of the child. Manitoba provides that the court *may* take into account the views of the child, while in Nova Scotia the court may order a child to be brought to court, but does not require that his or her views be considered. Alberta does not require that the views of capable children be considered, but its *Provincial Court Act*, R.S.A. 1980, c. P_20, s. 32(2)(b), provides that a child may bring an application to the provincial court for custody and access.

Is domestic violence taken into account?

As indicated above, only Newfoundland, the Northwest Territories and Nunavut expressly require that a court hearing an access application take domestic violence into account when determining what is in the best interests of the child. An amendment to Ontario's statute that has never been proclaimed, provides that "in assessing a person's ability to act as a parent, the court shall consider the fact that the person has at any time committed violence against his or her spouse or child, against his or her child's parent or against another member of the person's household" (*Children's Law Reform Act*, R.S.O. 1990, c. C.12, s. 78(3)).

Are the best interests of the child a primary consideration in access enforcement?

Only the laws in Alberta, Manitoba and Saskatchewan provide that the best interests of the child are a consideration when making an access enforcement order.

Section 61.4(1) of Alberta's *Family Law Statutes Amendment Act*, 1999, S.A. 1999, c. 22, provides that any orders or decisions made by the court under the Act in relation to enforcement of access orders "must take into consideration the best interests of the child."

Manitoba's *Child Custody Enforcement Act*, R.S.M. 1987, c. C360, s. 14.1, provides that the court may order compensation for expenses or supervision of access in cases of wrongful access denial or wrongful failure to exercise access, "taking into account the best interests of the child." Apprehension of the child and punishment for contempt are provided for in subsections 9 and 14, but these remedies are not subject to consideration of the best interests of the child.

Saskatchewan's *The Children's Law Act*, S.S. 1997, c. C-8.2, s. 26, provides for remedies for wrongful denial of access and for wrongful failure to exercise the right of access, which may be ordered by the court when it is "of the opinion that it is in the best interests of the child." Apprehension of the child and punishment for contempt are provided for in subsections 24 and 29, but these remedies are not subject to consideration of the best interests of the child.

2. PREVENTIVE AND ALTERNATIVE MEASURES

Are difficult cases identified early and special measures taken to deal with them?

No province or territory has made statutory provision for automatic assessment of every contested case so that a determination is made about what measures are appropriate. British Columbia's *Family Relations Act*, R.S.B.C. 1979, c. 121, s. 3, however, authorizes the Attorney General to appoint a person to be a Family Court counsellor, who may offer the parties any advice or guidance that would help resolve the dispute, and may offer to refer the parties to a qualified public or private family counselling service or agency.

Most jurisdictions allow court before which an access application is brought to order an "investigation" or "assessment" or the appointment of an independent expert to help determine what is in the best interests of the child (Alberta Rules of Court, AR 390/68, Rule 218; *Family Relations Act*, R.S.B.C. 1979, c. 121, s. 15; *Family Maintenance Act*, R.S.M. 1987, c. F.20, s. 3 and *Court of Queen's Bench Act*, S.M. 1988-89, c. 4, s. 49; *Children's Law Act*, R.S.N. 72 1990, c. C-13, s. 36; *Children's Law Act*, S.N.W.T. 1997, c. 14, s. 29; *Family Maintenance Act*, R.S.N.S. 1989, c. 160, s. 19; *Children's Law Reform Act*, R.S.O. 1990, c. C.12, s. 30 and *Courts of Justice Act*, R.S.O. 1990, c. C.43, ss. 89 and 112; *Children's Act*, R.S.Y. 1986, c. 22, s. 43).

Is there provision for parental education?

Although parental education programs are provided in most provinces and territories to some extent, there is as yet no legislation mandating such programs.

Alberta's statute provides that in cases of access denial or failure of the non-custodial parent to return the child in accordance with the access order, the court may order "the respondent, the applicant or the child, or any one or more of them, to attend such educational seminar, parenting course, counselling or other similar types of session as may be directed and requiring proof of such attendance as determined by the court" (*Family Law Statutes Amendment Act*, 1999, S.A. 1999, c. 22, ss. 61.3(3)(c) and (d)). Under section 61.3(7)(b), such an order may be made even when the denial of access was "excusable." Alberta has also amended its *Provincial Court Act*, R.S.A. 1980, c. P-20, s. 32(1.3), to permit courts that make custody or access orders to require the parties to "attend any course or program prescribed by the regulations."

Is there provision for voluntary mediation?

Most jurisdictions provide for court-ordered mediation. Only Quebec requires parties to attend an information session on mediation prior to the hearing of any contested custody application. Ontario and Yukon allow court-ordered mediation only "at the request of the parties." No jurisdiction puts limits on court-ordered mediation in cases of domestic violence.

The federal *Divorce Act*, R.S.C. 1985 (2nd Supp.), c. 3, s. 9(2), requires lawyers acting for a party to a divorce proceeding to advise their clients on the advisability of negotiating support, custody or access and to tell them about mediation facilities that might be able to help negotiate those matters. Saskatchewan's statute has the same provision (*The Children's Law Act*, S.S. 1997, c. C-8.2, s. 11).

Manitoba's *Court of Queen's Bench Act*, S.M. 1988089, c. C280, s. 47, provides that a judge may refer an issue to a mediator when the judge thinks that "an effort should be made to resolve the issues otherwise than at a formal trial."

New Brunswick's *Family Services Act*, S.N.B. 1980, c. F-2.2, s. 131, provides that "if the court is of the opinion that any question arising might reasonably be the subject of conciliation, and that it would be in the best interests of the family to attempt to resolve the question through conciliation, the court may make an order requiring the Minister to make conciliation services available to the parties and may adjourn the proceeding for a reasonable time." Under section 131.1, "where conciliation services are made available by the Minister under section 131, the parties to the proceeding shall pay for the cost of the conciliation services in equal portions unless the court directs that one party pay the cost in total or that the parties pay the cost in unequal portions as specified by the court."

Newfoundland's *Children's Law Act,* R.S.N. 1990, c. C-13, s. 37, provides that in an application for custody or access, "the court, at the request of the parties, by order may appoint a person selected by the parties to mediate a matter specified in the order," and that the court must only appoint a mediator who has consented to act. Under subsections 41(2)(d) and 41(6)(c), the court may order the appointment of a mediator in accordance with section 37 for wrongful denial of access or failure to exercise access without reasonable notice or excuse.

The Northwest Territory's *Children's Law Act*, S.N.W.T. 1997, c. 14, s. 71, and as duplicated under the *Nunavut Act,* S.C. 1993 c. 28 as. am., provide that on an application for custody or access a court may appoint "a person selected by the parties to mediate any matter that the court specifies." Under subsections 30(2)(d) and s. 30(4)(c) the court may appoint a mediator in accordance with section 71 for wrongful denial of access or failure to exercise access without reasonable notice or excuse.

Ontario's *Children's Law Reform Act*, R.S.O. 1990, c. C.12, s. 31, provides that, at the request of the parties, the court may make an order appointing a person to mediate any matter.

The *Code of Civil Procedure of Quebec*, L.R.Q. c. C-25, articles 814.3-815.2, sets out the following. First, the parties are required to attend an information session on the mediation process before the hearing of a disputed custody or access application in court. At the end of the information session, the couple must choose between mediation or court proceedings. At any time, either party may terminate mediation without having to give reasons, and the mediator is required to terminate mediation when he or she considers pursuing it to be ill advised. The Family Mediation Service of the Superior Court must pay the mediator's fees up to the prescribed number of sessions. The court, at any time before judgment, may adjourn the hearing of an application, with a view to either reconciliation of the parties or their conciliation, in particular through mediation. The court may adjourn the hearing and refer the parties to mediation, each party bearing the proportion of the mediator's fees determined by the court.

Saskatchewan's *The Children's Law Act*, S.S. 1997, c. C-8.2, s. 10 provides that a court may order mediation on the application of one of the parties, but that either party, at any time after the first mediation session, may discontinue the mediation and proceed to have court resolve the matters at issue.

Yukon's *Children's Act*, R.S.Y. 1986, c. 22, s. 42, allows the court in an application for custody or access to, at the request of the parties, appoint a person selected by the parties to mediate.

Alberta's statute provides that if there has been denial of access or failure to return the child by the non-custodial parent in accordance with the access order, the court may appoint a mediator to help resolve the matter, but either party, at any time after the completion of the first mediation session, may discontinue the mediation and proceed to have the matter dealt with by the court (*Family Law Statutes Amendment Act*, 1999, S.A. 1999, c. 22, ss. 61.3(3) (d) and 61.8). Under section 61.3(7)(c), such an order may be made even when the denial of access was "excusable."

The amendments to Ontario's statute that have never been proclaimed allow the court, in the case of wrongful access denial or failure to exercise access without reasonable notice or excuse, to order mediation at the request of the parties: (*Children's Law Reform Act*, R.S.O. 1990, c. C.12, s. 83).

Is there provision for supervised access services?

Newfoundland, the Northwest Territories, Nunavut, Ontario and Yukon explicitly allow a court making an order for access to order that the access be supervised *(Children's Law Act,* R.S.N. 1990, c. C-13, s. 40; Northwest Territories, the *Children's Law Act*, S.N.W.T. 1997, c. 14, s. 23; Nunavut, the *Children's Law Act,* S.N.W.T. 1997, c. 14, s. 23, as duplicated under the *Nunavut Act,* S.C. 1993 c. 28 as. am.; *Children's Law Reform Act*, R.S.O. 1990, c. C.12, s. 34; *Children's Act*, R.S.Y. 1986, c. 22, s. 35. Saskatchewan's legislation implies that courts may order supervised access, because it explicitly provides the when supervised access is ordered, the court may specify how much each party will pay.

Manitoba, Newfoundland, the Northwest Territories, Nunavut and Saskatchewan provide that supervision of access may be ordered in the case of wrongful denial of access or wrongful failure to exercise access (*Child Custody Enforcement Act*, R.S.M. 1987, c. C360, s. 14.1; *Children's Law Act,* R.S.N. 1990, c. C-13, ss. 41(2)(a) and 41(6)(a); *Children's Law Act*, S.N.W.T. 1997, c. 14, subsections 30(2)(b) and 30(4)(a); *Children's Law Act,* S.N.W.T. 1997, c. 14, subsections 30(2)(b) and 30(4)(a), as duplicated under the *Nunavut Act,* S.C. 1993 c. 28 as. am.; *The Children's Law Act*, S.S. 1997, c. C-8.2, ss. 26(1)(b) and (2)(a)).

The amendments to Ontario's statute that have never been proclaimed allow the court, in the case of wrongful access denial or failure to exercise access without reasonable notice or excuse, to require that mediation be supervised (*Children's Law Reform Act*, R.S.O. 1990, c. C.12, s. 83).

3. REMEDIES FOR ACCESS DENIAL

Is there statutory provision for justified access denial?

Newfoundland's *Children's Law Act*, R.S.N. 1990, c. C-13, s. 41(4), provides that a remedy is available only when denial of access is "wrongful," and provides that denial of access is not wrongful in the following circumstances: a) when the respondent believes on reasonable grounds that the child will suffer physical or emotional harm if access is exercised; b) when the respondent believes on reasonable grounds that he or she might suffer physical harm if access is exercised; c) when the respondent believes on reasonable grounds that the applicant is impaired

by alcohol or a drug at the time of access; d) when the applicant fails to present himself or herself to exercise the right of access within one hour of the time specified in the order or the time otherwise agreed on by the parties; e) when the respondent believes on reasonable grounds that the child is suffering from an illness of such a nature that it is not appropriate to allow access be exercised; f) when the applicant does not satisfy written conditions that were agreed on by the parties or that are part of the order for access; g) when, on numerous occasions during the preceding 12 months, the applicant had, without reasonable notice and excuse, failed to exercise the right of access; h) when the applicant had informed the respondent that he or she would not seek to exercise the right of access on the occasion in question; or i) when the court thinks that the withholding of the access is, in the circumstances, justified.

The Northwest Territories, Nunavut and Saskatchewan provide for enforcement of access orders when access has been "wrongfully denied" but do not define this term (*Children's Law Act*, S.N.W.T. 1997, c. 14, s. 30; *Children's Law Act,* S.N.W.T. 1997, c. 14, s. 30, as duplicated under the *Nunavut Act,* S.C. 1993 c. 28 as. am.; *Children's Law Act*, S.S. 1997, c. C-8.2, s. 26(1)).

Ontario's amendments to the *Children's Law Reform Act,* R.S.O. 1990, c. C.12, which have never been proclaimed, include a provision almost identical to Newfoundland's, in section 34a (4).

Alberta's legislation provides that a court may refuse to enforce an access order when a denial of access is "excusable," without defining the term. The Alberta law permits a court to enforce an access order with non-punitive measures even when denial is "excusable" (*Family Law Statutes Amendment Act*, 1999, S.A. 1999, c. 22, ss. 61.3(6)).

Are compensatory access and compensation for expenses available?

Compensatory access is explicitly provided for in the legislation of Alberta, Newfoundland, the Northwest Territories, Nunavut and Saskatchewan. Compensation for expenses relating to access denial is explicitly available under the statutes of Alberta, Manitoba, Newfoundland, the Northwest Territories, Nunavut and Saskatchewan.

Manitoba's *Child Custody Enforcement Act*, R.S.M. 1987, c. C360, does not expressly provide for compensatory access, but section 7 does allow the court to make other orders to give effect to a recognized order, which could include compensatory access. Section 14.1(1)(a) allows a court to order the custodial parent to provide reimbursement "for any reasonable expenses actually incurred as a result of wrongful denial of access."

Newfoundland's *Children's Law Act,* R.S.N. 1990, c. C-13, s. 41(2)(a), provides that "where the court is satisfied that access is being wrongfully denied to the applicant, the court may order the respondent to give the applicant compensatory access to the child for a period agreed on by the parties, or where the parties do not agree for a period that the court considers appropriate." Under section 41(3), "compensatory access shall not be longer than the access that was wrongfully denied."

In the Northwest Territories, the *Children's Law Act*, S.N.W.T. 1997, c. 14, s. 30 (2), and in Nunavut, the *Children's Law Act,* S.N.W.T. 1997, c. 14, s. 30 (2), as duplicated under the *Nunavut Act,* S.C. 1993 c. 28 as. am., says that, when a court is satisfied that the applicant has

been wrongfully denied access, the court may "make such orders as it considers appropriate, including any one or more of the following orders: a) requiring the respondent to give the applicant compensatory access to the child for the period agree to by the parties, or, if the parties do not agree, for the period the court considers appropriate;... c) requiring the respondent to reimburse the applicant for any reasonable expenses actually incurred as a result of wrongful denial of access."

Saskatchewan's *The Children's Law Act*, S.S. 1997, c. C-8.2, s. 26(1)(a), provides that when a court is satisfied that a person has been wrongfully denied access it may "require the respondent to give the applicant compensatory access to the child for the period: (i) agreed to by the parties; or (ii) that the court considers appropriate if the parties do not agree." Under section 27, in an application for enforcement of access under the Act or in an application under *The International Child Abduction Act, 1996*, "a court may order the respondent to pay necessary expenses incurred or to be incurred by the applicant, including: a) travel expenses; b) the costs of locating and returning the child; c) lost wages;... e) legal fees; and f) any other expenses the court may allow."

Alberta's *Domestic Relations Act* explicitly provides for compensatory access (subsections 61.3(1)(3) and 61.3(1)(7)(A)), and for compensation for expenses incurred as a result of the access denial (subsections 61.3(1)(3)(E) and 61.3(1)(7)(D)).

The statutory provisions of Ontario that have not been proclaimed provide explicitly for both compensatory access and compensation for expenses incurred as a result of access denial (*Family Law Statutes Amendment Act*, 1999, S.A. 1999, c. 22, ss. 61.3(3)(a) and (e); (*Children's Law Reform Act*, R.S.O. 1990, c. C.12, s. 83) (not yet proclaimed in force).

Is court-ordered apprehension available?

Manitoba, New Brunswick, Newfoundland, the Northwest Territories, Nunavut, Ontario, Prince Edward Island and Yukon have given statutory power to courts to make an order authorizing a person entitled to access or someone on that person's behalf to apprehend the child in order to give effect to the access order. These same jurisdictions, along with Alberta and Saskatchewan, empower courts to direct a law enforcement officer to apprehend and deliver the child to the person entitled to access (*Family Law Statutes Amendment Act*, 1999, S.A. 1999, c. 22, ss. 61.1 (1)(h), 61.3(3)(h) and 61.6(1); *The Child Custody Enforcement Act*, R.S.M. 1987, c. C360, s. 9 and *Family Maintenance Act*, R.S.M. 1987, c. F20, s. 11; *Family Services Act*, S.N.B. 1980, c. F-2.2. s. 132.1; *Children's Law Act*, R.S.N. 1990, c. C-13, s. 43; *Children's Law Act*, S.N.W.T. 1997, c. 14, s. 31; *Children's Law Reform Act*, R.S.O. 1990, c. C.12, s. 36; *Custody Jurisdiction and Enforcement Act*, R.S.P.E.I. 1988, c. C-33, s. 21; *The Children's Law Act*, S.S. 1997, c. C-8.2, s. 24 (court may order apprehension by "a sheriff, peace officer or other person"); *Children's Act*, R.S.Y. 1986, c. 82, s. 46). British Columbia's statute allows apprehension for enforcement of custody orders only (*Family Relations Act*, R.S.B.C. 1996, c. 128, s. 36).

British Columbia, Nova Scotia, and Quebec do not have statutory authority for apprehension to enforce access orders.

How are contempt of access orders punished?

The *Criminal Code*, R.S.C. 1985, c. C-46, s. 127(1) provides that "every one who, without lawful excuse, disobeys a lawful order made by a court of justice or by a person or body of person authorized by any act to make or give the order, other than an order for the payment of money, is, unless a punishment or other mode of proceeding is expressly provided by law, guilty of an indictable offence and liable to imprisonment for a term not exceeding two years."

In Alberta, the *Provincial Court Act*, R.S.A. 1980, c. P-20, s. 32(8), provides that any person who contravenes an access order made by the provincial court is liable to a fine of up to $1,000 or imprisonment for up to four months or to both. Also, civil contempt proceedings are available to litigants in the Superior Court (Rules of Court 390-68, Part 52).

In British Columbia, the *Family Relations Act*, R.S.B.C. 1979, c. 121, s. 128 (3), provides that a person who, without lawful excuse, interferes with access to a child about whom an access order has been made under the Act commits an offence.

Manitoba's *Child Custody Enforcement Act*, R.S.M. 1987, c. C360, s. 14(1), provides that contempt of court orders for access "will require a fine of no more than $500, or prison for no more than 6 months, or both." Section 14(2) provides that an order for imprisonment "may be made conditional upon default in performance of a condition set out in the order and may provide the imprisonment to be served intermittently." The *Family Maintenance Act*, R.S.M. 1987, c. F20, s. 50(1) applies to breaches of access orders and provides that a person who fails to comply with an order made under the Act is guilty of an offence and liable on summary conviction to fine of not more than $500 or to imprisonment for not more than six months or to both.

New Brunswick's *Family Services Act*, S.N.B. 1980, c. F-2.2, s. 130.7(1), provides that "in addition to his powers in respect of contempt, every judge of the Provincial Court may punish by fine or imprisonment, or both, any wilful contempt of or resistance to the process or orders of the Court in respect of custody of or access to a child, but the fine shall not in any case exceed one thousand dollars nor shall the imprisonment exceed ninety days." Under section 130.7(2), "an order for imprisonment under subsection (1) may be made conditional upon default in the performance of a condition set out in the order and may provide for the imprisonment to be served intermittently."

Newfoundland's *Children's Law Act*, R.S.N. 1990, c. C-13, s. 46, provides that "in addition to its powers in respect of contempt, a Provincial Court judge may punish by fine or imprisonment, or both, a wilful breach of or resistance to its process or orders in respect of custody or access to a child, but the fine shall not exceed $1000 nor shall the imprisonment exceed 90 days." An order for imprisonment "may be made conditional upon default in the performance of a condition set out in the order and may provide for the imprisonment to be served intermittently."

In the Northwest Territories, the *Children's Law Act*, S.N.W.T. 1997, c. 14, s. 73 and in Nunavut, the *Children's Law Act,* S.N.W.T. 1997, c. 14, s. 73, as duplicated under the *Nunavut Act,* S.C. 1993 c. 28 as. am., provide that "in addition to its powers in respect of contempt, the Territorial court may punish a person for any wilful contempt of or resistance to its process or orders under this Act by imposing on the person a fine not exceeding $5,000, a term of

imprisonment not exceeding 90 days or both." An order for imprisonment "may be made conditional upon default in the performance of a condition set out in the order and may provide for imprisonment to be served intermittently."

Nova Scotia's *Family Maintenance Act*, R.S.N.S. 1989, c. 160, s. 41(1) provides that the court to require a person to appear to explain the person's failure to comply with an order, or a party to the order may make an application to bring the matter before the court for determination. Section 41(2) provides that the court shall then determine the issue and may make any additional order it deems necessary to ensure the order is complied with, including an order for contempt, which may include imprisonment continuously or intermittently for not more than six months.

Ontario's *Children's Law Reform Act*, R.S.O. 1990, c. C.12, s. 38, provides: "In addition to its powers in respect of contempt, the Ontario Court (Provincial Division) [now called the Ontario Court of Justice] may punish by fine or imprisonment, or both, any wilful contempt of or resistance to its process or orders in respect of custody of or access to a child, but the fine shall not in any case exceed $5,000 nor shall the imprisonment exceed ninety days." Rule 60.11 of the *Ontario Rules of Civil Procedure* sets out the general rules governing motions for contempt in the Superior Court of Ontario, but there are no specific rules governing contempt of access orders for matters brought in that court. The *Family Law Rules*, which apply to proceedings commenced in the Family Court of the Superior Court of Justice and to the Ontario Court of Justice, address contempt motions in family law matters in Rule 31. Rule 31(5) allows a court, when it finds a person in contempt, to order that person to: "a) be imprisoned for any period and on any conditions that are just; b) pay a fine in any amount that is appropriate; c) pay an amount to a party as a penalty; d) do anything else that the court decides is appropriate; e) not do what the court forbids; f) pay costs in an amount decided by the court; and g) obey any other order." Rule 31(7) states that in a contempt order under section 38 of the *Children's Law Reform Act* [issued by the Ontario Court of Justice, i.e., the inferior court] the period of imprisonment and the amount of the fine may not be greater than that Act allows.

The *Code of Civil Procedure of Quebec*, L.R.Q. c. C-25, articles 49 and 50, allows a court to condemn a person who is guilty of contempt of a court order. Article 51 provides that a person guilty of contempt of court is liable to a fine of up to $5,000 or to imprisonment for not more than one year. Imprisonment for refusal to obey an order may be repeated until the person obeys.

Saskatchewan's *The Children's Law Act*, S.S. 1997, c. C-8.2, s. 29(1), provides that a court that is satisfied that a person has displayed "wilful contempt of orders or resistance to its process or orders with respect to custody of or access to a child" may impose: "a) in the case of a first finding of contempt: (i) a fine of not more than $5,000; (ii) imprisonment for a term of not more than 90 days; or (iii) both that fine and imprisonment; and b) in the case of a second or subsequent finding of contempt: (i) a fine of not more than $10,000; (ii) imprisonment for a term of not more than two years; or (iii) both that fine and imprisonment." Under section 29(2), a court may order that a term of imprisonment that be not more than 90 days to be served intermittently and may direct that at all times when not in confinement the person comply with conditions prescribed in the order. Under section 29(3), the court may order that when a person defaults in payment of a fine for contempt that person shall be imprisoned for a period not exceeding six months.

Are suspension of child support and transfer of custody rejected as remedies?

Every Canadian jurisdiction provides for variation of custody, access and support orders. None expressly prohibits a variation as a remedy for wrongful access denial.

Saskatchewan's *The Children's Law Act*, S.S. 1997, c. C-8.2, s. 26(1)(e), expressly provides that in the case of wrongful denial of access the court may vary a custody or access order, provided the court "is of the opinion that it is in the best interests of the child."

4. REMEDIES FOR ABDUCTION

Are there provisions aimed at preventing abduction?

Most jurisdictions have measures that may prevent a custodial parent from removing the child without notice. The *Divorce Act*, R.S.C. 1985 (2nd Supp.), c. 3, s. 16(7), authorizes a court to order a custodial parent, prior to changing the child's place of residence, to give at least 30 days' notice to any person granted access of the change of the time at which the change will be made and the new place of residence. Saskatchewan's legislation contains the same provision, except that it is mandatory for the court to make such an order (*The Children's Law Act*, S.S. 1997, c. C-8.2, s. 6(5)(b) and (6)). Alberta's *Domestic Relations Act*, R.S.A 1980, c. D-37, ss. 56(6) and 56(7), contains similar provisions. The province has recently amended its *Provincial Court Act*, R.S.A. 1980, c. P-20, s. 32(1.1) and (1.2), to include a similar provision.

The laws of Manitoba, New Brunswick, Newfoundland, the Northwest Territories, Nunavut, Ontario, Prince Edward Island, Saskatchewan and Yukon allow a court, when satisfied that a person prohibited by court order or agreement from removing a child from the province or territory proposes to remove the child, to make an order requiring a person: a) to transfer property to a trustee to be held subject to terms and conditions; b) to make any child support payments to a trustee; c) to post a bond payable to the applicant; or d) to surrender the person's passport, the child's passport or other travel documents (*Child Custody Enforcement Act*, R.S.M. 1987, c. C360, s. 10; *Family Services Act*, S.N.B. 1980, c. F-2.2, s. 132.2; *Children's Law Act*, R.S.N. 1990, c. C-13, s. 45; *Children's Law Act*, S.N.W.T. 1997, c. 14, s. 32 [the provision on child support payments has been eliminated]; *Children's Law Act*, S.N.W.T. 1997, c. 14, s. 32, as duplicated under the *Nunavut Act*, S.C. 1993 c. 28 as. am.; *Children's Law Reform Act*, R.S.O. 1990, c. C.12, , s. 37; *Custody Jurisdiction and Enforcement Act*, R.S.P.E.I. 1988, c. C-33, s. 22; *The Children's Law Act*, S.S. 1997, c. C-8.2, ss. 25 (also allows the court to vary or make custody or access order but does not indicate that this is subject to the best interests of the child); *Children's Act*, R.S.Y. 1986, c. 22, s. 47).

Are there provisions aimed at locating the child?

An order directing a law enforcement officer to locate and apprehend a child may be made under the apprehension provisions outlined above.

All jurisdictions except Alberta have enacted legislation on the release of information to help locate a child to enforce an access order: *Family Orders and Agreements Enforcement Assistance Act*, R.S.C. 1985, c. 4 (2nd Supp.); *Family Relations Act*, R.S.B.C. 1979, c. 121, ss. 39, 40, 98 (information goes to enforcement officer, applicant or person named by court); *Child Custody Enforcement Act*, R.S.M. 1987, c. C360, s. 13 (information goes to court) and

Family Maintenance Act, R.S.M. 1987, c. F20, s. 49(1) (information goes to judge); *Family Services Act*, S.N.B. 1980, c. F-2.2, s. 122 (information goes to court); *Children's Law Act*, R.S.N. 1990, c. C-13, s. 47; *Children's Law Act*, S.N.W.T. 1997, c. 14, s. 33 (information goes to court); *Children's Law Act*, S.N.W.T. 1997, c. 14, s. 33, as duplicated under the *Nunavut Act*, S.C. 1993 c. 28 as. am. (information goes to court); *Family Orders Information Release Act*, R.S.N.S. 1989, c. 161 (information held by province may be released by Minister to a) a person, service, agency or body (i) entitled to have a family order enforced, or (ii) authorized by the Minister to assist with the enforcement of a family order; or (b) a peace officer investigating a child abduction) and *Family Maintenance Act*, R.S.N.S. 1989, c. 160, s. 54 (information goes to court); *Children's Law Reform Act*, R.S.O. 1990, c. C.12, s. 39 (information goes to court); *Custody Jurisdiction and Enforcement Act*, R.S.P.E.I. 1988, c. C-33, s. 25 (information goes to court); *An Act Respecting the Civil Aspects of International and Interprovincial Child Abduction*, R.S.Q. c. A-23.01, ss. 8(1), 9 and 10 (information goes to applicant); *The Children's Law Act*, S.S. 1997, c. C-8.2, s. 28 (information goes to applicant or person court considers appropriate); *Children's Act*, R.S.Y. 1986, c. 22, s. 48 (information goes to court).

Are there provisions for return of the abducted child in non-Hague cases?

All provinces and territories except Alberta and Nova Scotia have enacted legislation allowing the court to order the return home of a child who has been wrongfully removed to or retained in the jurisdiction, or in cases in which the court does not have jurisdiction: *Family Relations Act*, R.S.B.C. 1979, c. 121, s. 47; *The Child Custody Enforcement Act*, R.S.M. 1987, c. C360, s. 7; *Family Services Act*, S.N.B. 1980, c. F-2.2, s. 130.1; *Children's Law Act*, R.S.N. 1990, c. C-13, s. 48; *Children's Law Act*, S.N.W.T. 1997, c. 14, s. 28; *Children's Law Act*, S.N.W.T. 1997, c. 14, s. 28, as duplicated under the *Nunavut Act*, S.C. 1993 c. 28 as. am.; *Children's Law Reform Act*, R.S.O. 1990, c. C.12, s. 40; *Custody Jurisdiction and Enforcement Act*, R.S.P.E.I. 1988, c. C-33, s. 16; *An Act Respecting the Civil Aspects of International and Interprovincial Child Abduction*, R.S.Q. c. A-23.01 (Quebec's legislation applies within Canada but is not currently in effect for cases involving other Canadian jurisdictions); *The Children's Law Act*, S.S. 1997, c. C-8.2, ss. 17 and 18; Children's Act, R.S.Y. 1986, c. 22, s. 49. These statutes may be applied to cases that are not governed by the Hague Convention on the Civil Aspects of International Child Abduction.

Has the Hague Convention been implemented?

Every province and territory has implemented the Hague Convention on the Civil Aspects of International Child Abduction, which applies to parental abductions from one contracting state to another of children younger than 16 but not to interprovincial abductions (*International Child Abduction Act*, S.A. 1986, c. I-6.5; *Family Relations Act*, R.S.B.C. 1996, c. 128; *The Child Custody Enforcement Act*, C.C.S.M. C360; *International Child Abduction Act*, N.B. Acts 1982, c. I-12.1; *An Act Respecting the Law of Children*, R.S.N. 1990, c. C-13; *International Child Abduction Act*, S.N.W.T. 1987, c. 20; *International Child Abduction Act*, S.N.W.T. 1987, c. 20, as duplicated under the *Nunavut Act*, S.C. 1993 c. 28 as. am.; *Child Abduction Act*, R.S.N.S. 1989, c. 67; *Children's Law Reform Act*, R.S.O. 1990, c. C.12; *Custody Jurisdiction and Enforcement Act*, R.S.P.E.I. 1988, c. 33; *An Act Respecting the Civil Aspects of International and Interprovincial Child Abduction*, R.S.Q. c. A-23.01; *The International Child Abduction Act*, S.S. 1986, c. I-10.1; *Children's Act*, R.S.Y. 1986, c. 82). All provinces and territories except Quebec have incorporated the Convention into the provincial or territorial law. A reservation has been

filed to the Convention for each of the provinces and territories except Manitoba so the provinces and territories are not bound to assume any costs resulting from the participation of legal counsel or advisers in court proceedings, except in accordance with their Legal Aid plans. Quebec's statute does not incorporate the Convention into provincial law but restates and adopts the principles of the Convention. Under section 4 of Quebec's statute, the notion of wrongful removal or retention is expanded to include cases in which it occurs when proceedings for determining or modifying the rights of custody have been introduced in Quebec or in the designated state where the child was habitually resident, and the removal or retention might prevent the execution of the decision to be rendered. Quebec's statute also governs interprovincial child abductions. It explicitly provides in section 12 that it "also applies to secure the peaceful enjoyment of access rights and the fulfilment of any conditions to which those rights may be subject and to remove, as far as possible, all obstacles to the exercise of such rights."

5. ENFORCEMENT OF FOREIGN AND EXTRAPROVINCIAL ACCESS ORDERS

Is there provision for unilateral recognition and enforcement of foreign and extraprovincial access orders?

The *Divorce Act*, R.S.C. 1985 (2nd Supp.), c. 3, s. 20, provides that an access order made under the federal *Divorce Act* has legal effect throughout Canada and may be enforced throughout Canada. Under section 20(1), the definition of *court* for the purpose of this section may be expanded by each province to include a provincial court, thus making it possible to use the quicker and less expensive enforcement procedures available in provincial courts.

Every province and territory, except Nova Scotia, allows unilateral recognition and enforcement of foreign and extraprovincial access orders. All jurisdictions allow court to supersede or vary such orders as appropriate, but details of this part of the legislation are not given here.

Alberta and Manitoba have enacted legislation to recognize and enforce foreign and extraprovincial access orders, under which a court enforces an access order as if it had been made by the court, unless it is satisfied that the child did not at the time the order was made have a real and substantial connection with the granting jurisdiction (*Extra-Provincial Enforcement of Custody Orders Act*, R.S.A. 1980, c. E-17, ss. 1(c) and 2; *The Child Custody Enforcement Act*, R.S.M. 1987, c. C360, s. 3).

New Brunswick, Newfoundland, the Northwest Territories, Nunavut, Ontario, Prince Edward Island and Yukon have enacted legislation to recognize and enforce foreign and extraprovincial access orders, under which a court must recognize and enforce an order as an order of the court, unless, in the proceedings in which the order was granted, the respondent was not given notice or an opportunity to be heard, the best interests of the child standard did not govern, the order is contrary to the public policy of the province or territory, or the court acted without jurisdiction (*Family Services Act*, S.N.B. 1980, c. F-2.2, s. 130.2(1); *Children's Law Act*, R.S.N. 1990, c. C-13, s. 49; *Children's Law Act*, S.N.W.T. 1997, c. 14, s. 34; *Children's Law Act*, S.N.W.T. 1997, c. 14, s. 34, as duplicated under the *Nunavut Act*, S.C. 1993 c. 28 as. am.; *Children's Law Reform Act*, R.S.O. 1990, c. C.12, s. 41; *Custody Jurisdiction and Enforcement Act*, R.S.P.E.I. 1988, c. 33, s. 17; *Children's Act*, R.S.Y. 1986, c. 82, s. 50).

Under article 3155 of the *Civil Code of Quebec*, S.Q. 1991, c. 64, Quebec "recognizes and, where applicable, declares enforceable any decision rendered outside Quebec except in the following cases: (1) the authority of the country where the decision was rendered had no jurisdiction under the provisions of this Title; (2) the decision is subject to ordinary remedy or is not final or enforceable at the place where it was rendered; (3) the decision was rendered in contravention of the fundamental principles of procedure;... (5) the outcome of a foreign decision is manifestly inconsistent with public order as understood in international relations...." Note as well that under article 3142, a Quebec court has jurisdiction to rule on custody of a child when the child is domiciled in Quebec, so an access order will be recognized and enforced when the child was domiciled in the granting jurisdiction. See articles 75 and 80 on the meaning of *domicile*.

Saskatchewan law requires a court to enforce an order for access "at specific times or on specific dates" as if it had been made by the court, but may refuse to enforce the order and may make any other order for access that it considers necessary when the child is in Saskatchewan and the court is satisfied on the balance of probabilities that the child would suffer serious harm if subject to access by the person entitled to access or is satisfied that the court that granted the access order did not have jurisdiction in accordance with Saskatchewan law (The *Children's Law Act*, S.S. 1997, c. C-8.2, ss. 14(2) and 17).

Nova Scotia only enforces access orders made by reciprocating states: *Reciprocal Enforcement of Custody Orders Enforcement Act*, R.S.N.S. 1989, c. 387, s. 3, and for registration and enforcement of access orders made by superior courts in other Canadian jurisdictions, *Family Maintenance Act*, R.S.N.S. 1989, c. 160, s. 43 (2).

6. ENFORCEMENT AGAINST THE NON-CUSTODIAL PARENT

Are non-custodial parents encouraged to maintain contact with their children?

No province or territory has enacted legislation aimed at encouraging non-custodial parents to maintain contact with their children, although legislative remedies for non-exercise of access may be viewed as indirect attempts to do so.

Is wrongful failure to exercise access defined?

Alberta has a remedy for failure to exercise access "without reasonable notice to the custodial parent" (*Family Law Statutes Amendment Act*, 1999, S.A. 1999, c. 22, s. 61.31). Manitoba has remedies for "wrongful" failure to exercise access, but does not define the term (*Child Custody Enforcement Act*, R.S.M. 1987, c. C360, s. 14.1(2)). Newfoundland has remedies for failure to exercise access "without notice and excuse" (*Children's Law Act*, R.S.N. 1990, c. C-13, s. 41(6)). Saskatchewan law says that failure to exercise access is "wrongful" unless it is justified by a legitimate reason and the non-custodial parent gave reasonable notice of the failure and of the reason (The *Children's Law Act*, S.S. 1997, c. C-8.2, s. 26(3)). Ontario has enacted remedies for failure to exercise access "without reasonable notice and excuse," but this provision is not in force (*Children's Law Reform Act*, R.S.O. 1990, c. C.12, s. 34a (6)).

What remedies are available for failure to exercise access?

Alberta, Manitoba and Newfoundland, the Northwest Territories and Nunavut allow a court to order the non-custodial parent to reimburse the custodial parent for any reasonable expenses actually incurred as a result of failure to exercise access (*Family Law Statutes Amendment Act*, 1999, S.A. 1999, c. 22, s. 61.31; *Child Custody Enforcement Act*, R.S.M. 1987, c. C360, s. 14.1(2)); *Children's Law Act*, R.S.N. 1990, c. C-13, s. 41(6). Ontario law has a similar provisio , but it has not been proclaimed (*Children's Law Reform Act*, R.S.O. 1990, c. C.12, s. 34a (6).

Newfoundland, the Northwest Territories and Saskatchewan allow a court to order mediation (*Children's Law Act*, R.S.N. 1990, c. C-13, s. 41(6); The *Children's Law Act*, S.S. 1997, c. C-8.2, s. 26(2)). Ontario also allows court to order mediation, but the provision is not in force (*Children's Law Reform Act*, R.S.O. 1990, c. C.12, s. 34a (6)).

Manitoba, Newfoundland, the Northwest Territories, Nunavut and Saskatchewan allow a court to order supervised access (*Child Custody Enforcement Act*, R.S.M. 1987, c. C360, s. 14.1(2); The *Children's Law Act*, S.S. 1997, c. C-8.2, s. 26(2)). Ontario also allows a court to order supervised access, but the provision is not in force (*Children's Law Reform Act*, R.S.O. 1990, c. C.12, s. 34a(6)).

Saskatchewan allows a court to order the non-custodial parent to give security for performance of the obligation or provide his or her address and telephone number (The *Children's Law Act*, S.S. 1997, c. C-8.2, s. 26(2)).

7. RESPONSIBILITY FOR ACCESS ENFORCEMENT

Is the government responsible for enforcing access orders or for providing preventive and alternative measures?

No province or territory has a government office to enforce access orders. No province or territory mandates that preventive or alternative measures be provided, except Quebec, which mandates that mediation be provided. In some provinces, civil Legal Aid may be available to parents to enforce access orders, depending on the merits of the case and financial eligibility.

APPENDIX B
EXCERPT FROM OAKLAND COUNTY FRIEND OF THE COURT HANDBOOK

PARENTING TIME

This section of the Judgement spells out the rights of the non-custodial parent to see the children. Parenting time generally presents the greatest emotional problems for the parties, their children, relatives, friends, and new spouses.

What are "reasonable rights" of parenting time?

Most Judgements state that parenting time rights are "reasonable." This allows the parties great freedom in working out a comfortable parenting time program. Parenting time should change as the children mature and as the parties move to locations nearer or farther away from each other. Reasonable rights allow the parties to make these adjustments without going before the Court. If you cannot agree on what constitutes reasonable rights, make an appointment with the Friend of the Court for advice or for working out a parenting time program.

While parenting time programs are usually developed according to an individual family's situation and circumstances, a standard minimum recommendation for parenting includes alternating weekends from Friday to Sunday, alternate holidays, two weeks or more of summer vacation, and other school vacation time of children.

Parenting time is granted in accordance with the best interest of the child. The child should have a strong relationship with both parents. If the parents agree on parenting time terms, the Court will follow the parenting time terms unless the Court determines on the record, by clear and convincing evidence, that the parenting time terms are not in the best interest of the child. A child shall have a right to parenting time with a parent unless it is shown on the record, by clear and convincing evidence, that it would endanger the child's physical, mental, or emotional health.

In determining parenting time, the Court may consider the following factors:

A. Special circumstances of the child, whether the child is a nursing child.

B. The likelihood of abuse during parenting time.

C. The likelihood of abuse of a parent resulting from the exercise of parenting time.

D. The burdensome impact of travelling for parenting time on the child.

E. Whether the visiting parent will visit in accordance with the order.

F. Whether the visiting parent has frequently failed to exercise parenting time.

G. The threatened or actual detention of the child with the intent to retain or conceal the child from the other parent.

H. Any other relevant factors.

A parenting time order may contain any reasonable terms, including one or more of the following:

1. Division of the responsibility for transportation.
2. Division of the cost of transportation.
3. Restrictions on the presence of third persons during parenting time.
4. Requirements that the child be ready for parenting time at a specific time.
5. Requirements about specific times for the pick up and return of the child.
6. Parenting time to occur in the presence of a third party or agency.
7. Requirements that a party post a bond to assure compliance with a parenting time order.
8. Requirements of a reasonable notice when parenting time will not occur.
9. Any other reasonable condition determined to be appropriate.

Vacations out-of-state.

Either parent may take the minor child out-of-state for a vacation unless a court order prohibits it.

Parents are urged to notify the other parent of a telephone number and the location where the minor child may be reached in case an emergency arises.

Spare the children.

Parenting time is often unnecessarily traumatic for parents and children. When picking up and dropping off the children, the non-custodial parent must remember that parenting time is the only purpose for being at the home of the custodial parent. That parent is not there to "check-up" on the custodian. The marital home is no longer open to the non-custodial parent, and familiar rooms are now off limits.

Parenting time is for the parent and child.

Many parenting time disputes begin with a parent arriving with a new girlfriend or boyfriend. Leave your new acquaintances at home; the children need your full attention. They have a rough enough time adjusting without learning a new cast of players.

Grandparent parenting time.

In accordance with MCLA 722.27B, a grandparent of the minor children whose parents are in the process of divorce may petition the Court for parenting time privileges. Persons who become grandparents through their son's written acknowledgement of paternity or by the adjudication of a Court or by their son's regular contribution to the support of a child may also petition the Court for parenting time. The Friend of the Court does not file such petitions. It may be necessary for the grandparents to hire an attorney to assist them in this matter. The Friend of the Court will enforce parenting time for a grandparent once an order is entered.

The Friend of the Court encourages custodians to allow grandparents parenting time, but this is generally not required by court orders.

Show up for parenting time on time!

If you tell the children you are coming for parenting time, be sure to show up. The tales of children waiting all weekend for a parent who never appears are disturbingly common. Please phone a few days ahead if there is any question about whether or not you will show up.

Both parents are to be timely about the parenting time pick up and return. The custodial parent is to have the children ready at the scheduled time and be available at the return time. The non-custodial parent should arrive within a few minutes of the agreed upon or court-ordered time for both the pick up and return. If a parenting time pick up or return time absolutely cannot be met, a parent has the obligation to telephone the other parent about the delay.

Don't use the child as a spy.

A parent sometimes asks a child a lot of questions about what is going on in the other parent's home—questions about whether mom or dad has a boyfriend or girlfriend, if the new boyfriend/girlfriend is spending the night, if mom/dad asked questions about him or her. Sometimes the questions are to satisfy curiosity, but sometimes they are to hurt the other parent or to hurt the parent asking the questions. Sometimes the questions are to help a parent feel better about him or herself—that the other parent is not doing OK without the relationship.

Enlisting children to play this game complicates and confuses the relationships they have with both parents and is damaging to their emotional well being.

The list of possible sources of friction with parenting time is endless. Avoid as many of the pitfalls as possible.

1. Don't arrive for parenting time with expensive presents when your support is in arrears and necessities (groceries, clothing) are scarce in the custodial parent's home.

2. Don't always take the children to ball games, the circus, or fancy restaurants; do some casual things with them, too. (The custodial parent on welfare of a limited budget just can't compete, and friction will result.)

3. Don't tell the children you will have custody of them some day. Petition the Court for a change of custody and do your talking in the courtroom where it counts.

4. Pick up and return the children to their home on time.

5. Remember to spend time with your children. Often children are left with friends or lumped together with the new wife's or husband's children. The children need time with you.

6. If you can't talk to your ex-spouse at all, stick to a rigid schedule. Wait at the front door or in the car for the children, and have as little contact as possible with the other parent.

7. Don't expect the custodial parent to let you have the children if you have been drinking or using drugs.

8. If you do not have a driver's license, a relative or friend must do the driving.

9. If you are the custodial parent, don't forget to supply adequate clothing for parenting time and to inform the visiting parent of necessary medication and possible illness.

10. Car seats are required by Michigan law for **ALL** children under the age of one. In 1991, Michigan law was amended to require all backseat passengers under 18 to wear seat belts.

11. Parents should speak positively to the children about the other parent, or say nothing at all. Speaking negatively about the other parent will do more harm than good.

Don't deny parenting time to get support.

Support and parenting time are **NOT** dependent on each other. Parenting time should continue even if the payer is not paying support. File a complaint for enforcement of support with the Friend of the Court. Don't deny parenting time. Similarly, if you are denied parenting time, continue to pay support, and file a complaint for enforcement of parenting time.

Divorce or separation does not change the other parent. If he or she was a "casual" housekeeper, or was late most of the time, he or she will more than likely continue that behaviour.

Comply with the court orders or get them changed.

The following excuses by the custodial parent are **NOT** valid reasons for denying parenting time.

1. The child is sick (unless the non-custodial parent is provided with the specific nature of the illness and an opportunity to see the child).

2. The child had to go someplace else.

3. The child is not home.

4. The non-custodial parent is behind in their support obligation.

5. The child wants to stay home.

6. The custodial parent does not want the child to go on parenting time.

7. The weather was bad.

8. The child has no clothes to wear.

ENFORCEMENT OF PARENTING TIME ORDERS

The Friend of the Court assists the non-custodial parent in having parenting time as ordered by the Court. Correspondence, consultations and court actions, as needed, are used to ensure the children will have contact with the non-custodial parent. Parenting time complaints must be in writing. **If you wish to meet with a Family Counsellor, an appointment arranged in advance of the meeting is necessary.**

The Friend of the Court will provide the requesting party with a form that must be returned before enforcement will begin. The parties involved in a dispute over parenting time may request a joint conference with a Family Counsellor, or formal mediation.

APPENDIX C
LIST OF CONTACTS

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